SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 328

UNITED STATES, APPELLANT,

vs.

ROCCO TATEO

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

(File endorsement omitted)

1 UNITED STATES DISTRICT COURT
UNITED STATES OF AMERICA

No. C149-341

UNITED STATES OF AMERICA

v.

ANGELO P. JOHN, ROCCO TATEO and ARTHUR L. PAISNER,
Defendants.

Indictment—Filed March 30, 1956

The Grand Jury charges:

On or about the 2nd day of March, 1956, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation did take from the presence of John Purdy Ungemack, Mary Kostolos and Ernest Marino, money in the approximate sum of $188,785.62 belonging to, and in the care, custody, control, management and possession of the Port Chester Branch of the County Trust Company, a member bank of the Federal Reserve System. (Title 18, United States Code, Sections 2113(a) and 2).

SECOND COUNT

The Grand Jury further charges:

On or about the 2nd day of March, 1956, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, unlawfully, wilfully and knowingly did take and carry away, with intent to steal and purloin, money in the approximate sum of $188,785.62 belonging to, and in the care, custody, control, management and possession of the Port Chester Branch of the County Trust Company, a member bank of the Federal Reserve System. (Title 18, United States Code, Sections 2113(b) and 2).

2

THIRD COUNT

The Grand Jury further charges:

On or about the 2nd day of March, 1956, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, unlawfully, wilfully and knowingly did force Mary Kostolos to accompany them without her consent when they unlawfully, wilfully and knowingly, entered the Port Chester Branch of the County Trust Company, with the intent to commit in said bank the felony described in Count Two of this Indictment. (Title 18, United States Code, Sections 2113(e) and 2).

FOURTH COUNT

The Grand Jury further charges:

On or about the 2nd day of March, 1956, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, unlawfully, wilfully and knowingly, did receive, possess, conceal and dispose of money in the approximate sum of $188,785.62, knowing said money to have been taken, in violation of Section 2113(b) of Title 18, United States Code, from the Port Chester Branch of the County Trust Company, a member bank of the Federal Reserve System. (Title 18, United States Code, Section 2113(c)).

FIFTH COUNT

The Grand Jury further charegs:

From on or about February 1, 1956 and continuously thereafter up to and including the date of filing this indictment, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate subdivisions (b) and (c) of Section 2113 of Title 18, United States Code.

3 A. It was a part of said conspiracy that the defendants unlawfully, wilfully and knowingly would take and carry away, with intent to steal and purloin, a sum of money from the Port Chester Branch of the County

Trust Company, a member bank of the Federal Reserve System.

B. It was further a part of said conspiracy that the defendants unlawfully, wilfully and knowingly would receive, possess, conceal and dispose of said sum of money, knowing it to have been taken from said bank as described in paragraph A.

OVERT ACTS

1. In pursuant of said conspiracy and to effect the objects thereof, on or about the 28th day of February, 1956, in the Southern District of New York, Angelo P. John and Arthur L. Paisner, the defendants, and others to the Grand Jury unknown, were in the parking lot behind 121 North Broadway at White Plains.

2. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 28th day of February, 1956, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, were in the vicinity of the Port Chester Branch of the County Trust Company.

3. Further in pursuant of said conspiracy and to effect the objects thereof, on or about the 1st day of March, 1956, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, went to the home of Mary Kostolos in Port Chester.

4. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 2nd day of March, 1956, in the Southern District of New York, Arthur L. Paisner, the defendant, entered the Port Chester Branch of the County Trust Company.

4 5. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 2nd day of March, 1956, in the Southern District of New York, Angelo P. John, Rocco Tateo and Arthur L. Paisner, the defendants, were at the A & P parking lot on Regent Street in Port Chester.

6. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of March, 1956,

in the Southern District of New York, Angelo P. John, the defendant, went from White Plains to Byram, Connecticut.

7. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 4th day of March, 1956, in the Southern District of New York, Arthur L. Paisner, the defendant, went to 2213 East Tremont Avenue, Bronx.

8. Further in pursuance of said conspiracy and to effect the objects thereof, on or about the 6th day of March, 1956, in the Southern District of New York, Rocco Tateo, the defendant, went to 4110 Bronxwood Avenue, Bronx.

(Title 18, United States Code, Section 371.)

PAYTON K. DOYLE
Foreman

PAUL W. WILLIAMS
United States Attorney

Endorsements on Indictment

April 2, 1956

Angelo P. John pleads not guilty. Remanded without bail.

Rocco Tateo pleads not guilty. Remanded without bail.

Henry K. Chapman and James Rilsheimer assigned as attorneys to defend Paisner.

Pleading adjourned to April 3, 1956. Remanded.

Ryan, J.

April 5, 1956

Arthur L. Paisner pleads not guilty. Remanded without bail.

Ryan, J.

May 2, 1956

Arthur L. Paisner pleads guilty (attorney present) to counts 1; 2, 4 and 5.

Sentence adjourned until May 16, 1956. Remanded.

Noonan, J.

May 15, 1956

(Trial begun before Noonan, J.)

All 3 defendants appear for trial. Attorneys present.
Trial severed as to Defendant Arthur Paisner.
Trial continued as to Defendants Tateo and John.
Jury impanelled (3 alternates).

May 16, 1956—Trial continued
May 17, 1956—Trial continued
May 18, 1956—Trial continued
May 21, 1956—Trial continued
6 May 21, 1956—Trial continued

Defendant Tateo changes plea of "Not Guilty" to "Guilty" on counts 1, 2, 4, 5. (Attorney present.)
Trial severed as to Defendant Tateo and continued as to Defendant John. Defendant Tateo remanded pending sentence.

May 22, 1956—Trial continued

Defendant John changes plea of "Not Guilty" to "Guilty" on counts 1, 2, 4, 5. (Attorney present.)
Sentence of all 3 defendants Tuesday, June 5th, 1956.
Pre-sentence report ordered on all 3 defendants.
Defendant Angelo P. John remanded.

Noonan, J.

June 5, 1956

All defendants sentenced by Noonan, J.
See judgments filed.

February 8, 1963

Rocco Tateo—Motion under Sec. 2255 of T28 slated to vacate and set aside judgment of conviction is granted and a new trial is also granted. See Opinion No. 28590.

Weinfeld, J.

February 25, 1963

Rocco Tateo—Brought before the Court. Bail fixed at $50,000. Remanded in lieu of bail. New trial set for March 18, 1963.

Murphy, J.

March 18, 1963

Defendant Rocco Tateo—Court appoints O. John Rogge, attorney. Adjourned to April 15, 1963. Motions only to be referred to Judge Tyler.

Tyler, J.

May 8, 1963

Defendant Rocco Tateo (Attorney present).

Filed Order dismissing as to Rocco Tateo and discharging him from the custody of the U. S. Marshal. (See Ordered Filed this date.)

Tyler, J.

6a UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Stenographer's Minutes on Plea of Guilty

7 New York, May 21, 1956, 3:45 p.m.

(The following took place in the absence of the jury:)

Mr. Christy: Your Honor, I think Mr. Kestnbaum has a matter to address to the Court.

Mr. Kestnbaum: If your Honor please, the defendant Tateo at this point wishes to plead guilty to the first, second, fourth and fifth counts of the indictment.

The Clerk: On April 2, 1956, to Indictment 249-341, dated 3/30/56, you pleaded not guilty to the first, second, fourth and fifth counts of the indictment. Do you now wish to change your plea to guilty?

Defendant Tateo: Yes, sir.

The Court: Well, do you waive the reading of those counts?

Mr. Kestnbaum: The defendant waives the reading of those counts.

The Court: As the record now stands, the defendant pleads guilty to counts 1, 2, 4, and 5, and the not guilty plea to count number 3 still stands.

8 Mr. Christy: That is right. The plea to counts 1, 2, 4 and 5 is satisfactory to the Government, and at this time the Government would move to sever count 3 as to Tateo at this trial.

The Court: I will grant the application.

Now, Mr. Tateo, have you discussed this with your counsel before deciding to plead guilty to counts 1, 2, 4 and 5?

Defendant Tateo: Yes, sir.

The Court: And you are familiar with what those counts are?

Defendant Tateo: Yes.

The Court: Have you read the indictment?

Defendant Tateo: Yes.

The Court: And you are aware of the penalty attaching to those counts on a plea of guilty?

Defendant Tateo: Yes, sir.

The Court: Do you know what the Court can sentence you to?

Defendant Tateo: Yes.

The Court: You make this plea of guilty to those four counts freely and of your own volition?

Defendant Tateo: Yes, sir.

8 The Court: After talking with your counsel and being fully apprised of all your rights?

Defendant Tateo: Yes, sir.

The Court: No one has made any promises to you in connection with this plea?

Defendant Tateo: No, sir.

The Court: No one has made any threats?

Defendant Tateo: No, sir.

The Court: No one has exercised any duress or coercion?

Defendant Tateo: No, sir.

The Court: And this plea is you own free act, as you say?

Defendant Tateo: Yes, sir.

Mr. Christy: Your Honor, I discussed this matter with Mr. Kestnbaum, and Mr. Kestnbaum has advised me that he has discussed it with his client Tateo and that he has advised Mr. Kestnbaum as to where additional money from this bank robbery is located. Mr. Kestnbaum has given me that information. I have asked the FBI to proceed to that place to see if they can locate the money, and they are en route at this time.

At this time we would request that the defendant consent on the record to a search of those premises where we understand the money is located.

Defendant Tateo: Yes, I consent.

The Court: You consent that the FBI search the premises, the address of which has been furnished by you to Mr. Kestnbaum and by him to the Government and to the Government agents.

Defendant Tateo: Yes, your Honor.

The Court: You have no objection to their going there and searching for this money and attempting to locate it and seize it if they locate it?

Defendant Tateo: None whatsoever.

The Court: Does the Government know the amount?

Mr. Christy: I understand, your Honor, that there is $35,000 located at this point.

Mr. Kestnbaum: Some of which money the defendant says is his own, your Honor.

The Court: Some of which he says is not the proceeds of the Port Chester robbery, is that correct?

Mr. Kestnbaum: That is correct.

The Court: And you told Mr. Kestnbaum how much you say of this money in this place is a part of the proceeds of the Port Chester robbery and how much you say is your own, is that correct?

Defendant Tateo: Yes.

The Court: And Mr. Kestnbaum you so informed
11 the government?

Mr. Kestnbaum: I have.

The Court: The trial will be severed as to the remaining count which is count 3, and the defendant does not have to come to court again tomorrow. He will be remanded pending sentence.

Mr. Christy: That is correct, your Honor. We may want to talk to him in the meantime.

The Court: I assume you want to talk further with your counsel, Tateo, as to what course, if any, in connection with this matter you wish further to follow. The marshal will let you talk to your counsel downstairs.

Mr. Kestnbaum: Yes. Mr. Christy is already aware of the defendant's attitude as to a future course of action.

Mr. Christy: Mr. Kestnbaum has told me what he thinks his client will do.

The Court: All right.

Mr. Kestnbaum: May the defendant talk with his wife for a moment?

The Court: Yes. He is in the custody of the marshal; it is up to the marshal, I assume.

(Adjourned to May 22, 1956, 10:30 a.m.)

11-a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

ANGELO P. JOHN, et al.

New York, 11:30 o'clock a.m.

Transcript of Sentencing Proceedings—June 5, 1956

Colloquy between Judge, Counsel and Defendants

The Clerk: For sentence: Angelo P. John, Rocco Tateo and Arthur L. Paisner.

Mr. Christy: Ready.

Mr. O'Brien: Ready.

Mr. Kestnbaum: Ready.

Mr. Kilsheimer: Ready.

Mr. Christy: Your Honor, before we get to the sentence which is before the Court today, there is a matter which should come before the Court, and that is the indictment of the defendants Angelo John and Arthur Paisner for the robbery of the Mount Vernon branch of the County Trust Company. I believe the indictment, sir, is before your Honor.

The Court: In that indictment there are three counts, and Tateo is only mentioned in the third count.

Mr. Christy: That is correct, your Honor. He is named in the conspiracy count.

The Court: He is not going to plead to that?

Mr. Christy: That is right, your Honor.

The Court: All right. Paisner.

11-b (Defendant Paisner approached the bench.)

The Clerk: On the first count, Arthur L. Paisner, the grand jury charges:

> "On or about the 24th day of September, 1954, in the Southern District of New York, Arthur L. Paisner unlawfully, wilfully and knowingly, by force and violence and by intimidation did take from the presence of Edmund L. Tichenor, Jean Beeber, George Kastin and William A. Strasser, money in the sum of approximately $97,563.60 belonging to, and in the care, custody, control, management and possession of the Fulton Avenue Branch of the County Trust Company, at Mount Vernon, New York, a member bank of the Federal Reserve System."

Do you withdraw your plea of not guilty on this count and plead guilty?

Defendant Paisner: Yes.

The Court: Have you discussed this with your counsel before you made this change of plea?

Defendant Paisner: Yes.

The Court: All right. You can sit down.

Now the defendant John on that indictment.

11-c The Clerk: Mr. Angelo P. John, the grand jury charges: That on or about the 24th day of September 1954, in the Southern District of New York, you did unlawfully, wilfully and knowingly, by force and violence and by intimidation did take from the presence of Edmund L. Tichenor, Jean Beeber, George Kastin and William A. Strasser, money in the sum of approximately $97,563.60 belonging to, and in the care, custody, control, management and possession of the Fulton Avenue Branch of the County Trust Company, at Mount Vernon, New York, a member bank of the Federal Reserve System.

The Court: Do you wish to withdraw your plea of not guilty and plead guilty at this time?

Defendant John: Yes, sir.

The Court: Have you discussed it with your attorney?

Defendant John: Yes, sir.

The Court: The entire situation; and you are familiar with what can happen?

Defendant John: Yes.

The Court: No one has threatened or coerced you to make this plea?

Defendant John: No, sir.

The Court: We may as well sentence John first.

11-d Does the Government want to say anything?

Mr. Christy: Yes.

The Court: First let us get it straight. He has pleaded guilty to Counts 1, 2, 4 and 5——

Mr. Christy: Of the Port Chester indictment.

The Court: —of the Port Chester indictment, and that is C. 149-341, and the Mount Vernon is C. 149-340; is that right?

Mr. Christy: Right.

The Court: All right.

Mr. Christy: May the Government make a statement with regard to both of these indictments, your Honor?

The Court: Surely.

Mr. Christy: Do you want to take them separately or shall we have John first?

The Court: They can both stand up.

Mr. Christy: May it please the Court, Arthur Paisner, Angelo John and Rocco Tateo stand before the Court for sentence, having pleaded to four counts of a five-count indictment, charging them with robbery from the drive-in branch of the County Trust Company in Port Chester.

There is an additional count in that indictment which charges them with kidnaping and to which

11-e they have not pleaded.

Arthur Paisner and Angelo John also stand before the Court for sentence, having pleaded guilty to the first count of an indictment charging them with robbery of the Mount Vernon branch of the County Trust Company in September of 1954.

I do not believe that the Court is aware of the facts of the Mount Vernon robbery, and I should like to spell them out briefly.

In September, or actually, on September 24, 1954, Angelo John and Arthur Paisner went to the Mount Vernon branch of the County Trust Company in Mount Vernon early in the morning. As they walked up to the bank, John

engaged the manager of the bank in conversation as the manager was about to enter the bank.

A few minutes later Paisner came up behind with a gun, and all three of them then entered the bank. This was on September 24, 1954.

When they got into the bank, they found that the manager actually had only one-half of the combination to the vault, and so they were forced to wait in the bank until the employee with the other half of the combination arrived. This turned out to be a woman teller, and when she arrived they let her into the bank and then they
11-f forced her and the manager to open the vault.

Other employees had come in, and these employees had been bound by Paisner and John and put off in one corner of the bank.

They then took with them over $95,000 and made their escape.

With regard to the proceeds of this robbery, none of the money has ever been recovered at all.

Now following this robbery, John and Paisner went down to Florida, where they began to spend the proceeds of this robbery. They bought clothes, they bought cars, and they also purchased some race horses. A great deal of this money from the Mount Vernon robbery was lost in bets at the various race tracks down there.

Now Rocco Tateo did not have any part in the actual commission of the robbery in the Mount Vernon branch of the County Trust Company. However, when Tateo heard or read in the newspapers that the Mount Vernon branch had been robbed, he assumed it had been done by his friends John and Paisner, and so Tateo went out to Paisner's store at 424 Boston Post Road; Paisner was not there, being in Florida——

The Court: 424 Boston Post Road where?

Mr. Christy: In Larchmont.

11-g Paisner was not there, of course, being in Florida; and so Tateo broke into the store. He took with him some stolen watches, or stole some watches which had originally been stolen, and which Paisner had at his store.

He also took with him a great deal of coin from the Mount Vernon robbery which Paisner had left there and had not taken with him to Florida.

After he had taken these items from Paisner's store, Tateo went down to Florida. He found out that John and Paisner were down there, and so he went down there.

He found John and Paisner, and at knife-point he demanded some money from them as the price for his silence about who had actually robbed the bank. In fact, he extorted approximately $7,000 from John and Paisner as the price for his silence, and with that $7,000 and while in Florida he bought a blue Cadillac convertible. He expended his $7,000 rather quickly, and he went back for more, but John and Paisner were not disposed to give him any more, so he returned to New York.

Upon his return to New York, he called up the local precinct out in The Bronx to inquire if there was any reward for the apprehension of the robbers of
11-h the Mount Vernon branch. Upon being advised by the detectives at the precinct that there was such a reward, he evinced interest, and a meeting was set up with the detectives. However, Tateo got cold feet at the last minute and he never actually showed up at the meeting.

Now with regard to the Port Chester robbery which occurred on March 2, 1955, I believe the Court is pretty familiar with most of the facts in that robbery; how Tateo, John and Paisner planned it, began thinking about it back in December 1954; how they stole a car which was to be used as the getaway car in the robbery; how they observed the employees, particularly Mrs. Kostolos of the drive-in branch; how they got together and pooled their information as they watched the bank individually; and getting right up to the night of the robbery when they took Mrs. Kostolos; how they went to her house in the evening in the stolen car, and how Paisner and Tateo, using a gun, forced Mrs. Kostolos into her own car, and they started on a drive—a rather harrowing drive for Mrs. Kostolos—which lasted from 10:50 in the evening until 3:30 in the morning.

Actually, as your Honor heard Paisner testify, Tateo and Paisner were in the car, John followed behind in a stolen Oldsmobile until the latter part of the
11-i evening.

At 2:30 in the morning Tateo got out of the car, having told Paisner that he had cold feet, and so Paisner

continued with Mrs. Kostolos until approximately 3:30 in the morning, when they entered the bank, and then stayed in the bank until 7:30 in the morning, when Ernest Marino, a teller, and John Purdy Ungemack, the treasurer, arrived.

Paisner, as your Honor knows, then forced Ungemack to open the vault, and escaped with some $188,000.

After he left the bank he went to the parking lot, which was their original plan, and there he was met by John and Tateo, who wanted to help him now that he had taken all the money.

Paisner was not disposed to give them any money at that time, but later in the day they had a meeting at Tateo's house, and at that time Paisner gave Tateo $35,000 and he gave John $30,000. John got less than Tateo because John owed Paisner approximately $5,000.

On March 7th, Paisner and John were apprehended, and on March 10, 1956, Tateo was apprehended in an uptown hotel in New York.

Now with regard to the individual defendants,
11-j I will take Arthur Paisner first.

He is 33 years old and single. In 1955 he was convicted of having a gun here in New York State and for that he was fined $100. This is the only known conviction of Paisner.

However, Paisner has been involved in other State crimes, by his own admission. Certainly he has been involved in the theft of cars, which he testified to on the stand, that were stolen cars used in both the Port Chester robbery and the Mount Vernon robbery.

At the time he was apprehended Paisner readily admitted that he was guilty of the Port Chester robbery, but at that time he refused to say who his accomplices were.

When John and Tateo were picked up and Paisner learned that Tateo had accused John of being in the car with Mrs. Kostolos on the night before the robbery, Paisner then told the entire story.

He told how they planned the robbery; what they did in preparation, and how they had actually committed it, and how much money each one of them had.

Paisner pleaded guilty to Counts 1, 2, 4 and 5, prior to the trial, and he, as your Honor knows, testified for the Government during the trial.

11-k He has at all times cooperated with the Government, and as far as the Government can ascertain, the story that Paisner told is an accurate one, accurate in its details, and had the trial continued, the Government was prepared to corroborate Paisner's testimony in all of its essential and salient parts.

Mrs. Kostolos, who was to be a witness for the Government, would have testified to having been in the car with Paisner and to the conversations they had during the time that she was riding around with him.

Now with regard to Angelo John. John is 34 years old. He is married and he is the father of three children, the last one having been born within one month of the robbery.

In 1953 he was convicted on a morals charge in Florida, and he was given a sixty-day sentence. At the same time he was convicted of simple assault and given an additional sentence.

In 1953, in Florida also, he was convicted of passing a fraudulent check, for which he was given a suspended sentence.

John has also passed a number of other bad checks in the past few years, for which he has not been prosecuted.

11-l He, too, has been involved in State crimes; certainly the theft of the stolen cars in the two robberies, and at the time of the Port Chester robbery he had a Willys station wagon which was, in fact, a stolen car.

Up until the time of the Mount Vernon robbery, John had lived with his wife in fairly meagre circumstances, rent free in the home of his in-laws. After the Mount Vernon robber and he had some money to spend, they moved into a $170 a month apartment in White Plains.

During this time, from the Mount Vernon robbery to the Port Chester robbery, John worked at miscellaneous jobs but he steadily avoided any steady occupation. In fact, his wife was working, worked as a stenographer for an attorney, and she was, in fact, forced to work right up until the day before that child was born, within a month of the Port Chester robbery.

John, as I said before, spent a good deal of the Mount Vernon robbery money in Florida on their trip, and spent the rest in and about Westchester County.

At the time of the Port Chester robbery he had very little funds. He was behind in his rent, and he had other unpaid bills. With the money that he got from the Port Chester robbery he actually paid his back rent
11-m and paid some of his bills. Some of this money, around $5,000 or $6,000, he put in his apartment in White Plains. The balance he hid in his mother's house in Byram, Connecticut.

When he was first apprehended he claimed he had some money in his home, that it was his own money; that it was the proceeds of gambling winnings; that part of it or half of it actually belonged to his wife. Nevertheless, he refused to consent to a search of his house at that time.

John, although he was not actually in the bank at the time the robbery occurred, and although he was not in the car with Mrs. Kostolos, shares the guild in this crime, the Port Chester robbery, equally with Paisner and Tateo.

With regard to Tateo, he is 32; he is married and he has no children.

In 1943 he was convicted of petty larceny, and he received three years probation.

In 1944 he was a Selective Service violator and a warrant was issued for his apprehension. He was apprehended on this warrant in the Southern District of New York, but the complaint charging him with the violation was dismissed when Tateo went into the Navy.

11-n While he was in the Navy he was AWOL several times, and he finally deserted. He was adjudged a deserter by the Navy, but he was never actually prosecuted for it, and he eventually received a bad conduct discharge from the Navy.

In 1950 he was arrested and convicted of a gambling violation involving policy and he received fifteen days.

Tateo has had no steady employment for some years. In fact, he reported no income in the years 1953 and 1954; in the year 1953 he was actually taken as a dependent by his wife; in 1954 they filed a joint return, but the only income listed on their return was that of his wife's. Yet he always seemed to have a great deal of money, and at the time of his arrest he had several cars. He had two Cadillacs and a Nash Rambler.

When, as I said before, he was in Florida, he bought

himself a blue Cadillac convertible. He brought it up to New York and traded it in on an El Dorado, and then proceeded to steal another blue Cadillac convertible similar in make, model and color to the one that he traded in; and this car was found in The Bronx following his arrest.

11-o Tateo, too, has been involved in other State crimes. Certainly the robbery of Paisner's home and the robbery of the cars that were used in the Port Chester robbery.

Tateo got $35,000 from Paisner following the Port Chester robbery. He buried part of this in his father-in-law's shack in the Bronx, and the rest he put in his mother's home under the sink in the kitchen.

It is interesting to note that both John and Tateo put some of this stolen money in the mother's home, which I think evidences a very callous feeling toward close members of one's family.

The money that Tateo buried in his father-in-law's shack and put in his mother's home was found prior to the trial. The balance of the money was found at the time that Tateo pleaded, and I believe the Court is aware of the location of that money.

Tateo, although he has been married, has had several girl friends, among whom was Elizabeth Rodriquez, who testified during the trial.

At the time Tateo first met her and started taking her out, she was only 17 years old. The Court, I think, was able to observe the demeanor of Rodriguez on the stand

11-p and to observe the influence, the evil influence, that Tateo had exercised over her. I think that that was evident.

I think it is also indicative of his character that at the time the FBI was looking for him in the week of March 10th, he hid behind this young girl's skirts by going to a hotel in uptown New York and registering there under her name. Tateo was not in the bank at the time of the robbery. He was in the car, but he shares the guilt of this crime equally with Paisner and John.

Thank you, your Honor.

The Court: Mr. O'Brien, do you want to say anything?

Mr. O'Brien: If it please the Court, I am aware——

The Court: Excuse me.

Mr. Christy, on the four counts of indictment 149-341, to which all of the defendants have pleaded guilty, will you tell me the penalty on each one?

Mr. Christy: On count 1 the penalty is twenty years; on count 2 the penalty is ten years; on count 4 the penalty is ten years; on count 5, which is a conspiracy, the penalty is five years.

The Court: And on the one count——

Mr. Christy: The number one count in the Mount Vernon indictment, the penalty is twenty years.

11-q Mr. O'Brien: May it please the Court, I am aware that you have before you a probation report or presentence report, and from my own experience I am also aware that those reports are, as a rule, full and complete.

In view of that, I do not think that there is much that I can say without being repetitious. I am not going to quarrel with any of the facts as stated by Mr. Christy except for one or two items, among which is the story of the kidnaping.

My understanding is that no kidnaping was ever contemplated by any of the defendants up until the time the kidnaping actually took place. The plans were otherwise. There was no need for any such procedure or action.

The Court: But it did take place. Even though they did not plead guilty, we know what happened.

Mr. O'Brien: Yes, sir, but the defendant John took no part in the actual kidnaping.

The Court: He was in the car right outside Mrs. Kostolos' house.

Mr. O'Brien: Yes, but nevertheless he took no part in the actual kidnaping.

The Court: No physical part; I will agree with that.

11-r Mr. O'Brien: At that particular time there was no kidnaping contemplated. It was contemplated to obtain the key from Mrs. Kostolos, and also the combination, but, as I say, no kidnaping was contemplated. John was not there when the woman was questioned. John found out the woman was kidnaped for the first time when Paisner and Tateo drove off in the car with the woman.

Shortly after that he dropped the whole plan and returned to his home. He did not go into the bank. He did not come into contact with any of the people in the bank.

The Court: I don't want to interrupt you, Mr. O'Brien, but I just want to get the record straight.

Paisner testified, as I recall, that the plans as between Tateo and him on the one hand and John on the other were flexible; that there were several possibilities which were arranged upon, and only in the event of dire need was John to go into the bank, because he felt that having once lived there he might be recognized by somebody, but his plan was that either he would go into the bank with Paisner if absolutely necessary, or that he would stay in the parking lot with the other car, or that he would drive by the bank when he felt the robbery had been consummated, so they could pick Paisner up, but
11-s Paisner said what John was actually to do was John's decision to be made, if Paisner is telling the truth.

Mr. O'Brien: In any event, your Honor, he did not go into the bank, nor did he park in front of the bank.

One other thing that I believe should be called to your Honor's attention is the fact that although money was placed in the home of John's mother, the money was placed in an equipment box or a tack box used in connection with the horses or horse gear, and that tack box was not located in the house proper but in a garage which was completely set off from the rest of the house; and to that garage no one had access but the defendant. There was only one key to the garage, and the garage always remained locked.

Now although the money was in the house or near the house, there was certainly nothing in this action which would jeopardize the position of John's family.

However, as I say, there is little that I can say that would not already appear in the presentence report. But this case is a case, although it may sound as though these are old words, in this case I am very sincere about
11-t the statements I am making, a case of a boy running into a bad crowd and then running with a bad crowd.

The Court: There is no doubt he comes from a very fine family. It is in the report.

Mr. O'Brien: Up to the time that he came in contact with these co-defendants, he had never been in any trouble with the exception of the Florida business, and I understand that the morals charge down there was more or less a shakedown proposition, and although the record indicates a sentence of sixty days, no such sentence was actually imposed upon him. Other members of his family are familiar with the situation. He did not have the money to pay and consequently the charge was pressed but the sentence was not.

Now the defendant has a family; he has a wife, and now he has three children for whom he has the greatest regard. At the time that he first started going with the co-defendants he had a business of his own at which he worked hard, and, I understand, made a sizable profit.

Shortly thereafter his business started to fail; competition moved in, and when he tried to stand up for his rights he was advised by the local police departments that he could do nothing about it.

11-u So he was gradually pushed from different spots that he had found and developed in his catering business.

Consequently, as his business fell off, he became short of cash. He did have a wife and two children at that time; he had to support them, and he was lead into these deals; he started to run the wrong way; got his money the wrong way.

Following the Mount Vernon robbery, although it has been said that he did not have any type of job to work at, he was in the racing business; he did own a horse and he did actually race that horse on the Florida tracks and the New England tracks, and also New York State, at least at one track in New York.

He developed the horse, which is now supposed to have a tremendous potential.

In connection with the Port Chester robbery, once again at the end of the season, with no horses running, he was short of cash, he owed money; his wife had just had a child. But he was not interested in any bank robbery, he was interested in money.

Now he did not conceive that plan; he did not materially assist in the planning of the entire robbery, but he did take some part; there is no question about that, and he wound up with some of the money.

11-v The Court: I may be wrong, Mr. O'Brien, but just from my neutral position on the bench during the course of the trial, I had the distinct feeling that Mr. John was the brains behind the whole operation. I may be wrong; that was just my impression. Certainly Paisner could not lead the horse to water, much less make him drink.

Mr. O'Brien: No, sir, there is no claim here that John was forced into this, none whatsoever; but certainly the facts indicate that he was not the leader or the brains. The brains of any proposition, whether robbing a bank or any other type of endeavor or enterprise, illegal or otherwise, would result in the brain receiving the major share of the money. I do not think there is any question about that.

The Court: That would be true, of course, on the theory that there is honor among thieves, unless the brain, at the last minute, chickened out, which is what John did, leaving the muscle to collect the money, and then the muscle didn't want to share it too much. But certainly there was no reason why Paisner should pay off John, and even one-third of the amount he had stolen from the bank, unless because of Johns' help in arranging the robbery and scheming it out.

11-w As I say, that does not affect the merits of the case one way or another. I just had the distinct feeling that John was the one who was the brain, and although Paisner was the one whose name seemed to be most mentioned during the trial and in the newspapers and everything else, that he was almost what he called himself during the course of the trial—a patsy.

Mr. O'Brien: Well, he painted that picture, and he painted it very nicely for us. However, I am convinced, your Honor, that that is not the situation.

Now following the conviction, the defendant has cooperated fully with the Probation Office; he is willing to cooperate wtih anybody who is interested in receiving his cooperation, and while that may seem to be a little

late, your Honor is familiar with the reasons for which and by reason of which the defendant did persist in going to trial and was on the verge of going all the way and facing a sentence, which your Honor had already indicated.

The Court: I can say, Mr. O'Brien, that had he gone through to the conclusion of the trial, I am morally certain that there would have been a conviction on all counts, and I am just as certain that I would have given John the maximum on each count consecutively, which
11-x would be a long time in jail. It would be sixty-five years in jail to follow a life sentence on the kidnaping charge.

Mr. O'Brien: The defendant was advised of that fact, your Honor, and still, for the sake of his pride, persisted in going on with the trial until finally he changed his mind and decided to admit to his guilt.

As I say, your Honor is aware of the reasons for that action.

The Court: Yes, I recall.

Mr. O'Brien: Now there is something else that I think is very important. I have here a letter which was mailed to me uncolicited, I might say, and I think your Honor knows me well enough to appreciate that that is so, and——

The Court: Anything you tell me, Mr. O'Brien, I believe.

Mr. O'Brien: Thank you, sir.

I think your Honor should read that letter, which was written by the defendant to me.

(Paper handed to the Court.)

Mr. O'Brien: Now I believe, your Honor, that that letter is indicative of the defendant's present mental attitude. He has done wrong; he knows he has done
11-y wrong and he regrets it, and his intentions are to make it up in any way possible; to become once again a good citizen and a hard-working boy. He has ambition. His ambitions were misdirected for a period. He has a family to live for and to work for. He has three small children; one is three or four months old; another four years; another six years old. He has a wife who is standing by him.

I am not going to ask your Honor to pat him on the back or anything of that sort. He did wrong and he deserves to be punished, but I am going to ask your Honor to take into consideration his present mental attitude, which I think is a permanent attitude, and in imposing sentence, exercise as much leniency as your Honor can under the circumstances.

The Court: It might be easier if I took one at a time in the sentencing.

Do you want to add anything to what your counsel has said, Mr. John? Do you want to make a statement?

Defendant John: I guess not. I don't know what I can say.

The Court: You see, in a case like this, as you know just as well as I do, the ones who suffer most are the wives and children.

11-z Now unfortunately you have got this blot on your record that you are not going to be able to erase except by paying a penalty which society says you owe at this time, and I want you to know that I was very serious and earnest when I said that if you had been convicted by the jury I intended to give you the absolute maximum sentence, a life sentence plus all of these years to follow the life sentence.

If anybody wonders how one can serve a sentence after he has served a life sentence, it is very simple, because in a life sentence you are eligible for parole in fifteen years; but with a sentence to follow a life sentence, you are not eligible for parole on the life sentence, and you have to stay in jail for the rest of your life.

What you did was a very horrible thing. What you did on the record, of course, is only part of what you actually did. I do not know whether it was your or Paisner or Tateo who engaged in all of these burglaries and armed stickups throughout Westchester County, these warehouses and factories and the like. Certainly one or more of you participated in those robberies; so I think that you were well advised considering pleading at the time that you did because you necessarily saved the

11-aa Government the expense and trouble of further prosecution of the case and disposed of it by a plea of guilty, and for that reason you are entitled to

some consideration. I do not think that under the circumstances it would be proper for me to impose all of those sentences on your consecutively, due to the fact that you pleaded guilty.

But there have been—and this may not be your fault necessarily, except that you have participated in two of these—there has been a rash of bank holdups, and somebody has to ring down the curtain on these things.

Now of course while you have not pleaded guilty to the kidnaping charge, yet there is no doubt in my mind that you and the other two are guilty of kidnaping; and to me, of course, that is the most heinous offense involved in this whole setup. Even though no harm came to the woman and she was not touched in any way, I will say that in fairness to all of you, particularly to Paisner, who drove around with her all night until he brought her into the bank, he did not molest her in any way, and I really believe him when he said that if she had asked to go home he would have taken her home and forgotten the whole thing. The poor soul was probably too nervous and
11-bb too frightened by what had been going on to say anything, much less to expect that she was going to be allowed to go home just by asking.

Well, there is no point in moralizing.

I might add that the Probation Department, Mr. John, informs me that the members of your family, all of whom are good people, are going to suffer more than you, and the Probation Department also agrees with me in my belief that you are the master, the mastermind behind this whole deal. But I am not going to give you any more of a sentence for that.

On count one on indictment C. 149-341 I will impose a sentence of twenty years; on counts two and four I will impose a sentence of ten years on each count to run concurrently with each other and concurrently with the sentence on count one; on count five of that indictment, C. 149-341, I will impose a sentence of five years to run consecutively with the prison sentence on count one; so that the total prison sentence on indictment C. 149-341 will be twenty-five years.

On indictment C. 149-340 I impose a further sentence of twenty years to run concurrently with the sentence imposed on indictment C. 149-341.

That means, Mr. John, if you behave yourself and make a decent record for yourself in prison, that
11-cc you will be eligible to apply for parole—I do not say you will get it, but you will be eligible to apply for parole at the end of eight and a third years and for the sake of your wife and your children, at which time I hope they will have had a chance to get over this and forget this business, those who are old enough to understand it—that you will be able to come back and be a father to them and at least some help to them.

Basically, you have it in you to do it, and I fervently hope that you will be able to accomplish that.

Mr. Kestnbaum: If your Honor please, I sincerely believe that the defendant Tateo has bared his soul to me. I think that has been partially evidenced by disclosures I have made to Mr. Christy and to law enforcement agencies after the plea.

He tells me that he did not threaten the other defendants with a knife. It may be an aside, but he did not do it! and he said he got $4,700 from them voluntarily as far as the Mount Vernon episode is concerned; and so I assume——

The Court: He is not involved in that.

Mr. Kestnbaum: No. I assume the Government is going to dismiss that.

11-dd Now I think there are some factors that entitle this defendant to fair measure of consideration on the part of this court.

After he had pleaded guilty to the various counts of the indictment, which collectively subject him to a maximum prison term of twenty-five years, and I am sure your Honor is familiar with the decisions that the other counts, one, two and four, can't be consecutive but must be concurrent——

The Court: That's right, but they could be consecutive to the life sentence had they been convicted.

Mr. Kestnbaum: That is true.

The Court: That is what I was trying to say.

Mr. Kestnbaum: But he did plead guilty to these counts, so that he was then subjected to a maximum prison sentence of twenty-five years. At that point you had a complete change in this defendant. He cooperated fully and

in a manner that I think is rare in this court, with the United States Attorney's office and with law enforcement agencies; and as just a part and parcel of that cooperation and as evidence of the new attitude that he had adopted, he disclosed voluntarily where he had secreted
$35,000, the major part of which were the proceeds
11-ee of this bank robbery; and I submit to your Honor
that as a basic and fundamental concept of law enforcement and to encourage and to advise others that cooperation does bring reward, this defendant should receive consideration at your hands for that disclosure and for that cooperation.

The Court: Well, you will admit that at that point he was sort of standing with his back against the wall and no place else to go, Mr. Kestnbaum.

Mr. Kestnbaum: That is true.

The Court: I mean, he is entitled to some consideration, but let us not labor that too much, Mr. Kestnbaum.

Mr. Kestnbaum: No, but I point out that he faced a maximum of twenty-five years, and he then cooperated and made this rather unique disclosure, I think it is, and I think he is entitled to consideration for that, and I think others who review this case should know that the Court does recognize that sort of cooperation.

The Court: I intended to take that into account.

I also considered something else that you have not even mentioned. I think his pleading guilty when he did was a
further inducement to compel John to plead guilty.
11-ff Mr. Kestnbaum: I am coming to that.
The Court: Particularly when you announced the next morning that he was ready to testify for the Government.

Mr. Kestnbaum: Yes. I am coming to that.

As a further evidence of the complete change in the mental attitude of this defendant when he saw the folly of his path; he was ready to cooperate in every way conceivable. He had indicated, and I am sure that Mr. Christy and Mr. Debevoise will back me up, and I am sure your Honor is aware of the——

The Court: I do not view all of this with such rose-tinted glasses. He did on the trial exactly what he did on the night of the kidnaping, when he jumped out of the car

and said like Pilate, "I am washing my hands of this" and tried to get out of it. He heard the doors claning shut behind him when he started to shout he wanted to cooperate, but he is still entitled to some consideration for the fact that he did and not putting the Government to the expense and trouble of concluding the trial.

Mr. Kestnbaum: When he jumped out of that car at three or three-thirty in the morning, if the others had followed it would have meant an abandonment of the 11-gg actual bank robbery.

The Court: That is right, except he left her there with Paisner to bring her home.

Mr. Kestnbaum: Well, he is not the strong man in this, which I think is very much apparent, and he had run away from bad company, you might say, and that is apparent from his lack of participation in the other bank robbery.

Now, bearing all that in mind, your Honor, and bearing in mind that he is a married man, that he does see the error of his ways, and he ought to be given the opportunity to rehabilitate himself, that he is entitled to consideration, I think, your Honor, not only ought to show that this defendant, but as a lesson to others, that if they do toe the line and if they do offer their cooperation to the Government, they are going to be benefited by some measure of judicial clemency.

The Court: Do you want to say anything, Mr. Tateo?

Defendant Tateo: No, sir.

The Court: On C. 149-341, on count one, I will impose a sentence of twenty years; on counts two and four I will impose a sentence of ten years on each count to run 11-hh concurrently with each other and concurrently with the prison sentence on count one. Now on count five I will impose a sentence of two and a half years which is to run consecutively with the prison sentence on counts one, two and four, so that the overall prison sentence is twenty-two years and six months. I am giving him a two and a half year break.

Now the last one is Mr. Paisner, but before we start with Mr. Paisner I just want to say publicly that I feel that the people of this district and this state and this country are indebted once again to what I consider to be

the finest law enforcement agency in the world, and that is the Federal Bureau of Investigation. I think they have demonstrated once again their ability as an organization that is capable of unearthing crime, bringing the culprits to justice, no matter where they go or how they may hop around or how they may try to hide. Certainly every decent citizen owes a great debt to Mr. Hoover and to the FBI for the wonderful organization that he has created; the wonderful organization that he has functioning, and for the manner and methods that they use. No one can ever make a claim properly that he has ever suffered any loss of constitutional rights at the hands of the FBI.

It is not a secret police organization. It is an
11-ii organization that adheres rigidly to the letter and to the spirit of the Constitution, protects the rights of the innocent as well as apprehending and bringing to justice the guilty. I think that the work of the Federal Bureau of Investigation in this particular case is outstanding and I think I would be remiss if I did not make public mention of that fact, and at the same time to compliment Mr. Williams, the United States Attorney, and Mr. Christy and Mr. Thoms Debevoise, his two assistants, who so ably prepared this case for trial and presented it to the jury for the week or so that it was on trial before all the defendants pleaded guilty.

I also think that counsel deserve credit for being very cooperative with the Court, and especially Mr. Chapman and Mr. Kilsheimer, who represented Mr. Paisner, I think they deserve special mention because they have served entirely without pay or compensation at the request of the Court as assigned counsel, and they have done the same job that they would have done for Mr. Paisner had he paid them the largest fee they ever made in their lives. So I want to thank you, Mr. Chapman, once again. We are always indebted to you. And, Mr. Kilsheimer,
11-jj I want to thank you very, very much for the work you have done.

Mr. Kilsheimer: I certainly appreciate the Court's comments, and I am sure Mr. Chapman does also on our representation of Mr. Paisner.

There are a few factors I want to call to the Court's attention prior to the imposition of sentence on the indictments that are now before the Court.

Mr. Paisner is 33 years of age, and he has shown in the past that the is capable of doing fine work. He worked for the Cadillac division of General Motors up in New Rochelle for approximately six years, from 1946 to 1952. During that time Mr. Paisner showed himself to be a fine employee, and, as a matter of fact, when he left the Cadillac division it was not because of any disagreement with his employer, but, rather, that he sought more fruitful employment on his own, and he thereupon opened his own gas station and repair shop in Larchmont. As a matter of fact, the Cadillac people thought so much of Mr. Paisner and his work that they sent their overflow business to him when they could not handle it, which is an indication that they felt he was a fine mechanic and did very good work.

11-kk He had his gas station in 1952 until sometime in the spring of 1954, and it was while he was running his own gas station that he met the other two defendants in this case.

Prior to the Mount Vernon bank robbery, which was in September of 1954, Mr. Paisner had never been in any trouble with the criminal law; had never been convicted of anything.

He was for over fourteen years the sole support of his mother. Mr. Paisner's family is not a family of great means, and the other members of the family had their own financial obligations to their own families, and as a result it was to this defendant that his mother had to turn for support, and this defendant did support her. He worked as much as eighteen hours a day during the period of time that he was working at his own gas station in order to raise enough finances to get himself out of debt and to keep his mother in support.

He also helped many other people with money from time to time, and, as a matter of fact, I am informed that even the last child that John's family had was paid for by this defendant.

The one conviction, prior conviction that was mentioned by Mr. Christy was that of the possession of
11-ll a gun in August of last year. It was a misdemeanor, and he was fined but $100.

I am informed that the background facts concerning that are that when this defendant was in Florida earlier in the year, he had lent some friend of his, an acquaintance, rather, in Florida a sum of money, and the gun had been given to him as security, it was wrapped up and it was in the trunk of the car. He had never used it; he says he doesn't know how to use a gun. The guns that were used in both of the bank robberies are before the Court and were toy guns.

The defendant said that he insisted that no real gun be used because he wanted to make sure that no one got hurt, and I think that is indicative of this defendant.

It is sometimes difficult to understand how one who has a great ability to do work and has done good work for a great number of years can do something so wrong as these bank robberies; and I think probably the answer to it is that the defendant for the past year and a half had thought himself to be very severely ill, and it was because of that, this thought working and preying on his mind, that he
lost his incentive to work because he thought he had
11mm an incurable disease, and he went from a fine work record to a state of despair which led him into debt, and I think that is an explanation of how he happens to be so involved in these crimes.

The defendant has admitted his guilt from the day he was apprehended. As a matter of fact, when John was arrested, this defendant, in the presence of the FBI agents, told John that he ought to give up the money that he had, and I think that was one of the reasons why certain of the money was found at John's places at the time of his apprehension.

As to the Mount Vernon case, the defendant admitted his participation in that, and I think, as a matter of fact, in both cases, both the Port Chester robbery and in the Mount Vernon robbery the Government would have had a very difficult time in making out a case, if they could have made a case at all, without this defendant's cooperation.

I think the cooperation that he showed all along was that

he worked with the FBI agents for many, many hours; he worked with the United States Attorney's office for many hours in the preparation of the case for trial.

Your Honor heard him testify. I have spoken to innumerable people who were in court at various times
11-nn during this defendant's testimony, and not one of them indicated to me that they thought that he gave anything but the absolute truth. As a matter of fact, Mr. Christy so confirmed the fact today when he made his statement.

I may point out to the Court that there had been some pressure brought upon this defendant not to testify in the case, and yet his cooperation was such that he went forward and did testify, and did testify completely.

This defendant has been in jail since he was apprehended in March, and I think he is entitled to credit for that, as well as very substantial credit for the cooperation that he gave to the Government in not only admitting his guilt, but he was instrumental in the return of all of the money from the Port Chester bank robbery, I believe, and he certainly did not lead the agents astray at all as to the whereabouts of the money. He told them exactly how much he had; exactly how much he had given to the other defendants, and those facts proved, I think, to be true, as well as all the rest of his testimony.

I think your Honor should give this defendant very substantial consideration for his cooperation, and
11-oo he places himself on the mercy of the Court.

Mr. Chapman: Your Honor, I just wanted to make one very brief statement. It was agreed that Mr. Kilsheimer would make the statement on behalf of Mr. Paisner, and needless to say, if I have not done so up to now, I want to say I thank you very kindly for your remarks, your Honor, and I certainly appreciate what you did say.

I got into this case about twenty-four hours before Mr. Kilsheimer came into the picture because Mr. Kilsheimer was not in court at the time and I was, and for no other reason.

As your Honor has remarked, we have given him the best that is in us regardless of the time involved and what I am going to say now is not in order to detract from what

you said about us, but before we got into the case, and I want your Honor to know this, Mr. Paisner had expressed his desire and had begun to cooperate with the Government, and we of course advised him as to his rights, we protected him in every possible way, and urged upon him as to his rights, we protected him in every possible way, and urged upon him to do what was right, which he did.

The Court: I recall the newspapers reporting that at the time of his arrest, and at the time he was arraigned before the Commissioner he admitted his guilt,

11-pp but the Commissioner told him to keep quiet.

Mr. Chapman: That is correct.

Now under those circumstances, and I add that only to show your Honor that at no time was his recalcitrant, and he did not require urging, and I say that not to detract from what Mr. Kilsheimer and I did for him, but from the very outset he was cooperative, and I think he did cooperate considerably, because those people I talked to also felt his testimony rang true. I think I can quote Mr. Debevoise as to that.

The Court: Yes. I listened to him too.

Mr. Chapman: And while there is always a great temptation to elaborate and embroider, I am told that Mr. Paisner did not do that, and what he says was essentially the whole truth.

I feel too, like Mr. Kilsheimer, that he should be in some way compensated for that. The only compensation your Honor can give him is leniency as to the time involved, and we realize that the crime is a serious one too.

The Court: Do you want to say anything for yourself, Mr. Paisner?

Defendant Paisner: I was very glad that you commented about Mr. Kilsheimer and Mr. Chapman.

11-qq The FBI were very fair to my family, and they treated me with a great amount of respect, and so did Mr. Debevoise and Mr. Christy, and I thank them for that.

And you so thoughtfully mentioned that the innocent people get hurt, and that is as true as anything else you have said, and for that I am sorry too.

The Court: Well, I have a feeling deep inside of me, Paisner, that somehow or other you are going to keep out

of trouble from now on. I do not know what makes me feel that way, but I do, and I hope that I am right.

One count one of indictment C. 149-341 I will impose a sentence of eighteen years; on counts two and four I will impose a sentence of ten years, each to run concurrently with each other and concurrently with the sentence on count one.

On count five I will impose a prison sentence of five years to be served concurrently with the prison sentence on the other counts of that indictment.

That is a total of eighteen years on that first indictment, the Port Chester one.

On indictment C. 149-340, on the first count I will 11-rr impose a sentence of eighteen years to be served concurrently with the sentence on count one of indictment C. 149-341.

That means if you behave yourself you will have a chance to get out in six years.

Mr. Kilsheimer: At this time, your Honor, the defendant moves to dismiss count three in indictment C. 149-341 and to dismiss counts two and three in indictment C. 149-340.

The Court: I think it would be better if they filed a nolle; don't you, Mr. Christy?

Mr. Christy: Any way you wish, your Honor.

Mr. Kilsheimer: I think it is frequently done this way when a defendant is sentenced on some counts of an indictment.

Mr. Christy: The Government would consent to it, your Honor, to the dismissal of those counts with regard to Paisner.

Mr. Chapman: May I respectfully suggest, your Honor, while you are considering the matter, there may be—I do not know that this is a fact, but based upon parole procedure the dismissal of a count won't stand in his way. As to a nolle prosequi, while we could not prove it, stands; whereas a dismissal——

The Court: All right. What is your motion 11-ss again?

Mr. Kilsheimer: The defendant Paisner moves to dismiss three counts of indictment C. 149-341, and to dismiss counts two and three of indictment C. 149-340.

Mr. Christy: The Government would consent to that motion, your Honor.

The Court: So ordered. I grant the motion.

Mr. Kestnbaum: May I make a similar motion on behalf of the defendant Tateo.

Mr. Christy: Your Honor, excuse me for interrupting Mr. Kestnbaum, but the Government would request that they proceed by way of nolle prosequi with regard to the defendant Tateo on the count, the one count of the indictment, Indictment C. 149-340.

The Court: Why not proceed by way of a nolle prosequi on both?

Mr. Christy: The Government would consent to a dismissal of count three of indictment 149-341.

Mr. Kestnbaum: I move to dismiss count three of indictment 149-341 on behalf of the defendant Tateo.

The Court: I will grant it on the Government's consent.

Mr. O'Brien: At this time your Honor, on
11-tt behalf of the defendant Joh, I move to dismiss count three of indictment C. 149-341 and counts two and three of indictment C. 149-340.

Mr. Christy: The Government will consent to that motion.

The Court: Granted.

Mr. Christy: Thank you, your Honor.

11-uu **Certificate of Clerk to Foregoing Transcript**

(Omitted in printing)

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29 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. C 149-341

UNITED STATES OF AMERICA

v.

ROCCO TATEO

(File endorsement omitted)

Judgment and Commitment—June 5, 1956

On this 5th day of June, 1956 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of unlawfully, wilfully and knowingly, by force, violence and intimidation taking, with intent to possess and steal, money belonging to the Port Chester Branch of County Trust Co., and conspiracy so to do. (Title 18, Secs. 2113(a), 2113(b), 2113(c), 2, and 371 U.S.C.) as charged in counts 1-2-4 and 5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) Years on count 1; Ten (10) Years on each of counts 2 and 4; Two Years and Six Months on count 5. Sentences on counts 1-2 and 4 are to run concurrently with each other. Sentence on count 5 to run consecutively to and to begin after sentence on counts 1-2 and 4. (Total sentence 22 years six months.)

Count 3 dismissed on motion of defendant's counsel. Government consents.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GREGORY K. NOONAN
United States District Judge

30

Notice of Motion to Vacate Judgment and Affidavit in Support

(Title omitted)

May 29, 1961

The defendant, Rocco Tateo, respectfully moves the Court to vacate the judgment imposed upon him in the above entitled case, and to permit him to withdraw his plea of guilty and to release and discharge him from imprisonment therefor, upon the following grounds and reasons:

The judgment of conviction was obtained in violation of the due process clause of our Constitution and laws of the United States.

This motion to vacate the judgment of conviction is based upon the records and files in the above captioned case and upon the affidavit hereunto annexed.

FRANCES KAHN
Frances Kahn,
Attorney for Defendant

To: Hon. Robert M. Morgenthau
United States Attorney for the
Southern District of New York:

Please take notice, that the motion for vacation of judgment herein, copy of which is annexed hereto, will be brought on for hearing before the Honorable Thomas F. Murphy, United States District Judge for the Southern District of New York, presiding at Room 318 in the United States Courthouse, Foley Square, New York, on the 12th day of June, 1961, at 10:30 o'clock in

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the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: May 29, 1961.

/s/ FRANCES KAHN,
Attorney for Defendant.
Office and P.O. Address
401 Broadway
New York City 13, N. Y.

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32 (Title omitted)

Affidavit In Support of Motion to Vacate Judgment

United States of America
Commonwealth of Pennsylvania
Lewisburg Penitentiary, ss:

Rocco Tateo, being duly sworn, deposes and says:

1. I am the defendant herein and make this affidavit in support of an application to the Court for the vacation of judgment and the sentence of imprisonment for twenty-two and one half years heretofore imposed upon me by this Court [Gregory F. Noonan, D.J.] on the fifth day of June, 1956 under Indictment bearing criminal number 149-341.

2. I have no further legal resources open to me, and I am prepared to accept and abide by the ultimate determination of this Court, subject to my right to appeal from an adverse order which may be entered herein, with or without a hearing, and nothing that I say herein is intended to minimize the seriousness of the offenses involved.

3. Heretofore, and on March 30, 1956, I was indicted by a Grand Jury in the United States District Court for the Southern District of New York on two separate indictments bearing numbers Cr. 149-340 and Cr. 149-341, for violation of Title 18, §§ 2113, 371 and 2, U.S. Code.

33 4. That Indictment Number 149-340 contained three counts charging me with Bank Robbery and Conspiracy while Indictment Number 149-341 contained five counts charging me with Bank Robbery and Conspir-

acy as set forth in paragraph number "3" hereof. I was indicted with two other co-defendants named Angelo P. John and Arthur L. Paisner on both indictments.

5. That thereafter and on or about May 16, 1956, I and the co-defendant, Angelo P. John, proceeded to trial before Hon. Gregory F. Noonan, United States District Judge, and a jury. During the trial I was represented by an attorney named Nathan Kestnbaum, Esq. At a certain part of the trial proceedings, my attorney discussed the entry of a plea of guilty in my behalf. I did and still maintain I was innocent of the crimes charged and refused to heed the suggestions of my counsel with respect to the interposition of a plea of guilty during trial. However, counsel kept pressurizing me to take his advice and plead guilty for I could possibly have the death penalty inflicted upon me by reason of kidnapping charges which were formulated by the office of the United States Attorney for the Southern District of New York. After several conferences between counsel and the Court, portions of which were relayed to me by my lawyer [an officer of the Court], in behalf of the Trial Court, I was placed in such fear as to be unable to adequately confer and consult with my lawyer, due to the undue pressure brought to bear upon me by the Court and counsel.

34 6. That upon information and belief, my trial counsel will testify at a hearing on the allegations of fact raised by the triable issues contained therein, that my plea of guilty was coerced or otherwise improperly induced by counsel rather than being the voluntary act of a defendant in that counsel overreached and improperly pressured me by his overall conduct in persuading me to plead guilty in mid-trial and by having the prosecutor and defense counsel improperly terrorizing me by threatening me with the death penalty.

7. That upon information and belief, the trial prosecutor and defense counsel improperly overbore me by enlisting the aid of my wife and family to induce me to plead guilty; and otherwise deceived or intimidated me by representing to me that the defense was hopeless; and further improperly induced me to plead guilty by holding forth to me the promise that counsel might be able to obtain a

substantial reduction of sentence when counsel and the prosecutor knew that the United States Attorney was adamant against anything less than a sentence that would confine me for a maximum period of time.

8. That the trial Court not only failed to protect me against the above mentioned acts of defense counsel and trial prosecutor but also, by assuming that my guilt, though not proven, could not be doubted, and by exploiting my ineptitudes in Court-room colloquy, led in repelling my assertions of my innocence and of my absolute unwillingness to plead guilty.

9. That the fundamental issue presented is whether my allegations point to violations of my statutory and constitutional rights such that, if those allegations are proven, I would be entitled to an order pursuant to § 2255, Title 28, United States Code. Since at the hearing herein, I can be permitted to testify subject to cross-examination, and I can be temporarily detained at the Federal House of Detention at 427 West Street in New York City where I may consult with my new attorney, Frances Kahn, Esq., in regard to the proof supporting the within allegations of my affidavit.

WHEREFORE, by reason of the foregoing allegations, deponent prays that a writ of ad testificandum may issue for the purpose of having the body of your deponent before this Honorable Court, at a date to be fixed by the Court, for the purpose of inquiring into the commitment and vacatur of judgment sought by deponent, and to do and abide such order as this Court may make in the premises.

Your deponent further prays this Court that thereupon he shall be granted the vacation of judgment and discharge from custody or, in the alternative, to be rearraigned to plead *de novo* to the aforesaid indictments, and for such other, further and different relief as to this Court may seem just and proper in the interest of justice.

Duly sworn to by O. Dainoff. Jurat omitted in printing.

ROCCO TATEO
Rocco Tateo, Defendant

AUGUST 21, 1961

See Court's Memorandum Opinion of this date.

/s/ EDMUND L. PALMIERI
Edmund L. Palmieri
U.S.D.J.

Copy Received
May 29, 1961
Robert M. Morgenthau
U. S. Attorney, So. Dist. of N. Y.

(File endorsement omitted)

36 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Notice of Motion for Rehearing and Affidavit in Support—Filed October 9, 1961

SIRS:

The defendant herein, Rocco Tateo, respectfully moves this Court for rehearing of his motion to vacate the judgment imposed upon him in the above entitled case, upon the grounds set forth in the affidavits of Rocco Tateo, Josephine Tateo and Mrs. Venera Avallone and upon the letter of counselor Nathan Kestnbaum, all of which is in support thereof.

PLEASE TAKE NOTICE that the motion for rehearing will be brought on before Room 318 for referral to Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, at Foley Square, County and City of New York, on the 16th day of October, 1961, at 10:30 A.M. of that day, or as soon thereafter as counsel can be heard, and for such other, further and different relief as may be just and proper in the premises.

Dated: New York, N. Y.
October 9th, 1961.

FRANCES KAHN
Attorney for Defendant
Office & P. O. Address
401 Broadway
New York City 13, N. Y.

37 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Affidavit in Support

COMMONWEALTH OF PENNSYLVANIA
FEDERAL PENITENTIARY
CITY OF LEWISBURG } ss.:

Rocco Tateo, being duly sworn, deposes and says:

That he is the defendant herein and respectfully submits his affidavit in support of his motion for rehearing and for such other, further and different relief as to this Court may sem just and proper in the premises.

Heretofore, your deponent submitted a motion pursuant to 28 U.S.C. § 2255 to vacate a judgment and sentence entered against him on June 5, 1956, and to permit him to withdraw his plea of guilty.

After oral argument before Hon. Edmund L. Palmieri, a Judge of this Court, the motion was denied by order dated August 21, 1961, in a seven page opinion by Judge Palmieri.

Prior to the time that the Court rendered its opinion denying the aforesaid motion, your deponent received a letter from his former trial counsel; original of which is hereunton annexed and forming part hereof as Defendant's Exhibit "A". This letter supports your deponent's contentions set forth in his original motion papers, that his plea of guilty was obtained by coercion on the part of the Trial Court.

38 Deponent respectfully refers to former counsel's letter marked Exhibit "A" herein,, which reads, in part as follows:

> "• • • However, I do want you to know that the *Judge during the trial informed me* that if you were found guilty, he would impose a life sentence upon you on the kidnap charge, and then add consecutive sentences thereto for the robbery charges. If this constitutes undue pressure on the part of the court you are entitled to have your conviction set aside, I believe."

That had Judge Palmieri been made aware of the foregoing letter by either the writer thereof or the defendant herein prior to the pronouncement of the adverse opinion denying the instant original application for relief pursuant to § 2255, U.S.C., it would have persuaded the Court to direct a hearing on the allegations contained in movant's affidavit which is not conclusively refuted by former counsel's affidavit submitted in behalf of the Government. It is reasonable to conclude that Exhibit "A" herein, refutes former counsel's affidavit submitted by the Government.

That through inadvertence and excusable neglect, deponent's present counsel did not include the foregoing letter of the former counselor.

It is significant to note that former counselor Kestnbaum omitted mentioning the facts set forth in his letter, supra, when counsel initially submitted his opposing affidavit. This too, would have possibly persuaded the Court to direct a hearing on defendant's allegations.

That the Assistant United States Attorney, in his opposing affidavit, made no attempt to oppose defend-
39 ant's allegations of an illegal sentence imposed upon him by the sentencing Court. In *U. S.* v. *Milanovich*, 81 S. Ct. 728, the Supreme Court held that the statute did not permit Milanovich to be convicted of both the robbery and the receipt of the loot. It said that the defendant should have been instructed by the Court that he could not plead guilty to both the robbery and receiving the stolen property. That the double conviction might have affected the severity of the sentence. Accordingly, the sentencing Court in the defendant's case could not legally accept a guilty plea to both counts; and that due to the error of the sentencing Court. ("One should not be held to a plea of guilty if it would result in manifest injustice." *Leonard* v. *U. S.* CA. Fla. 1956, 231 F. 2d 588). That the trial Judge's failed to instruct the defendant he could not plead guilty to both the bank robbery (2113(a)) and receiving the stolen money counts (2113(b)) and that the trial Judge erroneously accepted defendant's guilty pleas to both these counts which, indeed, and in fact had affected the severity of defendant's sentence. (Cf. *U. S.* v. *Milanovich*, 81 S. Ct. 728.)

At this juncture, the Court's attention is directed to U. S. Code, Title 18. Section 2113; Bank Robbery "and incidental Crimes. Section 2113(a) bank robbery by intimidation, etc; Sec. 2113(b). Whoever takes and carries away, etc., Sec. 2113(c), "Whoever receives and possesses, etc., and Sec. 2113(e)," forces any person to accompany him without consent of such person." (Kidnap charge).

The words, "and incidental crimes", after bank
40 robbery in the statute means "occurring as a necessary but minor result of something larger". Deponent contends that Sec. 2113(e) (kidnap charge) is relatively contained in the same statute as the bank robbery counts (2113(a), (b) and (c), and clearly indicates that the kidnap count, 2113(e) is merged with the bank robbery counts. Therefore, he further contends that since the kidnap charge 2113(e) is an aggravated offense contained in this statute, it could not be legally made to run consecutively to counts 2113 a, b, and c as charged in the indictuent or vice-versa.

That the Court's threatening statement, related to defendant by his counsel, "that if the defendant continued with the trial and was found guilty, the Court would impose a life sentence on the kidnap charge and then add consecutive sentences thereto on the robbery charges, so he would never get out of jail," was in effect, so clearly prejudicial that the defendant was deprived of the "fair and impartial" trial to which he was entitled, is comparable to *U. S. v. Salazar*, opinion slip 409, docket Number 26911, decided 2d Cir. August 7, 1961.

If in fact, deponent is correct in his contentions, then the Trial Court was substantially erroneous in stating to defendant, through his counsel, that the Court would impose a life sentence on the kidnap charge and then "add consecutive sentences thereto on the robbery charges" if the defendant continued with the trial and was found guilty; because this threatening statement left the defendant with no other alternative other than to guilty.
41 (See *Heflin* v. *U. S.* 3 L. Ed. 2d 407; also *Prince* v. *U. S.* 1 L. Ed. 2d 370).

Deponent also wishes to apprise this Court of the fact that his mental condition was such, that it was exceedingly

difficult for him to follow the proceedings or assist his defense counsel to prepare a defense, not only because of a limited (grade school) education, but also because he had then suffered a recent heart attack brought on by more than 7 hours of questioning by F.B.I. Agents at F.B.I. headquarters when the defendant was arrested. Indeed, he was given "Last Rites" by a Priest and rushed to Downtown Beekman Hospital where he was given several injections and emergency treatment. It is true that the defendant had entered a guilty plea to the whole indictment. But, this plea was entered in ignorance and his misapprehension of the law. (*Walker* v. *Johnson*, 312 U.S. 275, 285 (1941). Additionally, it was induced by undue pressure from the Trial Court through defendant's "unprotecting counselor". See Exhibit "A" appended hereto; compare *U. S.* v. *Salazar*, supra.

That this writ was not a belated bid or afterthought to secure your deponent's freedom may be borne out in a letter written to deponent by his sister on October 22, 1957; original of which is annexed hereto and made part hereof as Defendant's Exhibit "B". The aforesaid letter shows that as far back as the trial and further, in 1957, that his sister wrote, in part, as follows:

> "I just spoke to Kestnbaum he said that he has much in mind to do for you, but not quite yet * * * I asked him why did you make my brother plead guilty, when you started out to fight for his rights?—and asked
> 42 was it true that some one at the Court warned that if there was one thing that wasn't true, that Rocky would be give life? Kestnbaum said it is true, it was told to him and to O'brien, John's lawyer. I asked wasn't that sort of a threat and he said that he has all this in mind, but Rocky would have to serve some time before he could act on it."

From the foregoing Exhibit "B" it is logical to conclude that from the very outset, former defense counselor had apprised your deponent and his family that coercive tactics were employed by the Trial Court in order to have deponent bargain away or lose his right to properly enter a plea of guilty or to continue and enjoy a fair trial. A hearing should be ordered to resolves the triable issues

of fact raised in the original papers as well as in the instant moving papers. [See *U. S.* v. *Salerno*, 290 F. 2d 105].

Annexed hereto and forming part hereof as deponent's Exhibits "C" and "D" are the respective affidavits submitted herewith by deponent's wife, Josephine Tateo, and his sister Venera Avallone; all of which supports deponent's contention that his plea of guilty was obtained by mental coercion and undue pressure.

WHEREFORE, deponent prays that this Court grant a rehearing and that deponent be produced at such hearing to testify in his own behalf and to offer other proof, subject to cross-examination, and for such other, further and different relief as may be just and proper.

ROCCO TATEO
Rocco Tateo

Duly sworn to by O. Dainoff. Jurat omitted in printing.

(File endorsement omitted)

43

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

ROCCO TATEO, *Defendant.*

Opinion—February 8, 1963

APPEARANCES:

VINCENT L. BRODERICK, ESQ.
United States Attorney for the
Southern District of New York
United States Court House
Foley Square
New York 7, New York

Attorney for United States of America

CHARLES A. STILLMAN, ESQ.
Assistant United States Attorney
Of Counsel

GAYNOR, MOSHER, FREEMAN,
GLICK & PISANI, ESQS.
271 North Avenue
New Rochelle, New York

Attorneys for Defendant

JOSEPH R. PISANI, ESQ.
ROBERT A. FREEMAN, ESQ.
Of Counsel

44 EDWARD WEINFELD, D. J.

The defendant, now serving a sentence of twenty-two and one-half years, moves pursuant to section 2255 of Title 28, United States Code, to vacate the judgment of conviction entered upon his plea of guilty on the ground that the plea was coerced. The motion was first heard in July, 1961 in the Criminal Motion Part before a Judge other than the Trial Judge who denied it without a hearing.[1] Petitioner appealed and while his appeal was pend-

[1] Order dated August 21, 1961.

ing he moved for a rehearing in the District Court, filing additional affidavits. The Court of Appeals remanded the matter to the District Judge who had denied the defendant's motion "for consideration of a petition for rehearing now pending before him."[2] The District Judge, with the consent of the Government, then granted the defendant's motion for a rehearing and ordered a hearing to be
45 held in the Criminal Motion Part. Thus the matter came before this Court, which conducted a hearing and took testimony upon the issues presented by the defendant's original motion as supplemented by the additional affidavits.

On March 30, 1956 Rocco Tateo, the petitioner, and two others, Arthur Paisner and Angelo John, were charged in a five-count indictment with violations of the Federal Bank Robbery Act and conspiracy so to do.[3] The charges included: bank robbery by force and violence, under section 2113(a) of Title 18, United States Code; taking and carrying away, under section 2113(b); receiving and possessing, under section 2113(c); and kidnapping in connection with the robbery, under section 2113(e).

Prior to the trial, Paisner pleaded guilty to all counts except the kidnapping count. Tateo and the remaining codefendant, John, stood trial. On the fourth trial
46 day, May 21, 1956, Tateo withdrew his plea of not guilty and pleaded guilty to all counts except the kidnapping count. On June 5, 1956, following receipt of a presentence report, the Trial Judge imposed a total sentence on Tateo of twenty-two years and six months.[4]

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[2] Order of Court of Appeals, November 6, 1961.

[3] 18 U.S.C. §§ 2113 and 371 (1958).

[4] The sentence was as follows: count 1 (18 U.S.C. § 2113(a)), 20 yedrs; count 2 (18 U.S.C. § 2113(b)), 10 years; count 4 (18 U.S.C. § 2113(c)), 10 years; count 5 (18 U.S.C. § 371), 2½ years; sentences on counts 1, 2 and 4 to run concurrently with each other; sentence on count 5 to run consecutively to the sentence on the other three counts. The kidnapping count (count 3, 18 U.S.C. § 2113(e)) was dismissed with the consent of the Government.

The essence of the petitioner's present claim[5] is that his plea of guilty was not voluntary, but was the prod-
47 uct of coercive influence generated by the Trial Judge's statement in the midst of trial that if the defendant continued with the trial and were found guilty, the Court would impose a life sentence upon the kidnapping charge and maximum consecutive sentences on each of the remaining four counts to be served consecutively to the life term.

The defendant, his former attorney and his sister testified at the hearing. On the fourth trial day before the taking of testimony was resumed, the Judge called a robing room conference at which were present Tateo's attorney, the attorneys representing the codefendant, Angelo John, and the two Assistant United States Attorneys who were prosecuting the case. The Court, according to the testimony of Tateo's attorney, stated to the defense attorneys:

> "* * * I think I ought to tell you this. If you finish the trial and your clients are found guilty, I'm going to start off by imposing a life sentence on the kidnapping charge and then I'm going to add consecutive maximum sentences on the other counts on which they are found guilty."

The Trial Judge further stated, according to the
48 attorney, that whatever might be thought by others about sentences in excess of life imprisonment, nonetheless that was what he was going to do, and told them to "think it over." This conference took place after substantial evidence during three days of testimony had been given against the defendant by the codefendant Paisner who, after pleading guilty, had testified as a Government witness, and by Tateo's paramour.

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[5] This is his second application. In March, 1960 Tateo, appearing pro se, moved to vacate the sentence essentially upon the ground that he had withdrawn from the conspiracy prior to its completion, in consequence of which he was not guilty of the charges to which he had pleaded, and further that the plea had been entered "in ignorance and * * * misapprehension of the law" and by reason of inadequate representation by counsel. This motion was withdrawn in open court on July 20, 1960 as defendant retained counsel.

The trial was recessed. Tateo's counsel swore that at once he conveyed to his client exactly what the Judge had said. In response to the defendant's request for his opinion, his counsel expressed the view, on the basis of the testimony already received, that the Government's case was strong; that there was an excellent chance of conviction, and that he urged Tateo rather strongly to plead guilty. He further testified that he spent about half an hour discussing the situation with the defendant and that during this half hour the defendant mulled it over. Finally, the defendant said he wanted to get it off his chest and would go along with his lawyer's advice
49 to plead guilty. Up to this time, the attorney testified, there had been no conversations between him and his client as to a change of plea, and that it was the Trial Judge's statement which directly led to the discussion about the withdrawal of the not guilty plea. On cross-examination by Government counsel, the attorney admitted he did not advise his client not to plead guilty because he had been threatened by the Court, although he regarded the Court's statement as unfair and pretty close to a threat.

The defendant testified that during a recess on the fourth day of trial his attorney said to him, "I can't let you continue with the trial," and then informed him of the Judge's statement substantially as testified to by his trial counsel; that his counsel also told him that under such a sentence he would never get out of prison, and urged him to plead guilty, saying, "I can't gamble with your life. We can't go on with the trial; I won't let you." He further testified that he understood a life sentence plus consecutive sentences to mean that he would never
50 get out of jail and that he was not informed the Court was without power under the Federal Bank Robbery Act to impose consecutive sentences. His counsel likewise swore this matter was not discussed. Finally, the defendant swore that it was the Trial Judge's statement and the persuasion of his lawyer based thereon that caused him to withdraw his original plea of not guilty and to plead guilty.

Defendant also testified that within five or ten minutes after this initial conference with his lawyer, he was im-

portuned by his wife and sister to accept his lawyer's advice and to plead guilty in view of his report to them about the Judge's statement. The defendant's sister testified that both she and his wife entreated him to plead guilty because of the information which the attorney had conveyed as to the Court's statement and the lawyer's position that he could not gamble with the defendant's life.

The record indicates that the plea of guilty was entered shortly after the robing room conference.[6] The
51 defendant, when questioned by the Trial Judge, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, to ascertain whether the plea of guilty was voluntary and understandingly entered, acknowledged that it was made freely and without coercion or duress. He contends, however, that in fact the fear of spending the rest of his life in prison under a life sentence plus consecutive sentences led him to plead guilty; that it was not a voluntary, but a coerced plea.

The Government called no witness to challenge the attorney's testimony as to what the Trial Judge had told him or that, in turn, he had conveyed the message to the defendant. To be sure, there are some inconsistences between the testimony of the lawyer and that of his former client. The lawyer denies he ever told the defendant, as the latter testified, to answer agreeably when questioned by the Court as to the voluntariness of the plea or the absence of duress, coercion, or any promises. The attorney also did not recall that he told the relator he would not allow him to gamble with his life, or that before
52 the entry of the plea of guilty he had informed the defendant's relatives of the Court's statement; he believed that he had conveyed this information to them after the plea of guilty. However, these matters are not of material significance on the issue presented by petitioner's motion, since his fundamental claim that the Trial Judge made the statement attributed to him has been fully established and is not controverted. Indeed, the Government, for the purposes of this motion, assumes

[6] S.M. 338, 339 (May 21, 1956).

that the statement was made and transmitted to Tateo, but contends that notwithstanding, his plea of guilty was voluntary.

The issue presented falls within a narrow compass, to wit, whether the statement by the Trial Judge made and conveyed to the defendant before the completion of the Government's case, but after substantial evidence to support the indictment charges had been presented, that if the defendant proceeded with the trial and were found guilty, the Trial Judge would impose maximum and consecutive sentences upon the various counts of the indictment, which the defendant was advised by his lawyer and which
53 he understood meant actual life imprisonment, resulted in a coerced plea either as a matter of law or upon the facts, or both.

To further confine the issue, some preliminary observations are in order. The defendant's guilt or innocence is not in issue on this motion. And neither the passage of time nor the absence of any showing that in the event of a new trial a different result is likely requires the denial of the defendant's motion.[7] Moreover, the fact that the defendant in open court at the time of the entry of the plea stated that it was not coerced, while evidential on the issue, does not foreclose injury as to its voluntariness.[8]

54 A defendant has a fundamental right to stand trial and to require the Government to establish the charges against him in accordance with substantive and procedural due process requirements of the Federal Constitution. A defendant may, of course, obviate the required proof of his guilt by a plea of guilty, which has the conclusive force of a jury's verdict of guilty. However, an accused's plea may be accepted only if it is made

[7] See Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); United States v. Morgan, 346 U.S. 502 (1954); United States v. Morgan, 222 F.2d 673 (2d Cir. 1955); Haywood v. United States, 127 F. Supp. 485 (S.D.N.Y. 1954).

[8] Cf. Machibroda v. United States, 368 U.S. 487 (1962); United States v. Lester, 247 F.2d 496 (2d Cir. 1957); United States v. Shillitani, 16 F.R.D. 336 (S.D.N.Y. 1954). See also, Walker v. Johnston, 312 U.S. 275, 286 (1941). See generally, United States v. Davis, 212 F.2d 264 (7th Cir. 1954).

voluntarily and knowingly. And if it appears that a guilty plea is the product of coercion, either mental or physical, or was "unfairly obtained or given through ignorance, fear or inadvertence,"[9] it must be vacated as void since it is violative of constitutional safeguards. A conviction which rests upon a coerced plea of guilty, no less than one which rests upon a coerced confession, is inconsistent with due process of law.[10]

55 The issue of whether the guilty plea was in fact voluntary or the product of mental coercion cannot be determined with mathematical precision. Of necessity we deal in probabilities in deciding whether the defendant, at the time he pled guilty, had that free will essential to a reasoned choice either to continue with the trial or to enter a plea of guilty.[11] Its determination involves an evaluation of psychological factors and elements that may be reasonably calculated to influence the human mind. And while probing the human mind is beyond the ken of the average layman and indeed that of the average judge, the issue of the state of a man's mind is to be decided by the trier of the fact, whether court or jury, just as any other fact issue—the reasonable inferences to be drawn from all the surrounding facts and circumstances.[12]

56 A crucial question is what impact the Court's statement had upon the defendant; how he understood it and whether his understanding was reasonable under all the attendant circumstances.[13] It can hardly be questioned but that most persons on trial upon criminal charges are in a state of mental tension and great appre-

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[9] Kercheval v. United States, 274 U.S. 220, 224 (1927).

[10] Waley v. Johnston, 316 U.S. 101, 104 (1942). See Machibroda v. United States, 368 U.S. 487, 493 (1962). Compare Lyons v. Oklahoma, 322 U.S. 596 (1944); Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924).

[11] Cf. Blackburn v. Alabama, 361 U.S. 199, 208 (1960).

[12] Cf. United States v. Charnay, 62 Cr. 562, December 7, 1952, ... F. Supp. ... (S.D.N.Y. 1962); Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885) quoted in Bon-R Reproductions, Inc. v. NLRB, 309 F.2d 898, 909 (2d Cir. 1962) (Friendly, J., concurring and dissenting).

[13] See United States v. Lester, 247 F.2d 496 (2d Cir. 1957).

hension.[14] This strain is deepened as the trial progresses and as evidence supporting the charges is offered by the Government. This subjective reaction cannot be disregarded in appraising whether or not the defendant had the required free will of mind at the time of his guilty plea.

The choice open to this defendant when apprised during the trial of the Court's statement was rather severely limited. If, as was his constitutional right, he con-
57 tinued with the trial and were found guilty, he faced, in the light of the Court's announced attitude, the imposition of a life sentence upon the kidnapping charge, plus additional time upon the other counts, a sentence which his lawyer informed him and which he believed, not without reason, meant life imprisonment.[15] On the other hand, if he withdrew his plea of not guilty,
58 there was the likelihood, although no claim is made of any specific promise, of a substantially lower sentence, since it had been indicated that the kidnapping charge would be dismissed, as it was eventually.[16]

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[14] Cf. United States v. Kahaner, 203 F. Supp. 78, 87 (S.D.N.Y. 1962), appeal docketed, Sept. 11, 1962, No. 27784.

[15] That the view of his counsel and the defendant that such a sentence meant virtual life imprisonment was not unrealistic is underscored by the statement made by the Trial Judge at the time of sentence of the petitioner and his codefendants. The Court, in sentencing the defendant John, said, "* * * I am morally certain that there would have been a conviction on all counts, and I am just as certain that I would have given John the maximum on each count consecutively, which would be a long time in jail. It would be sixty-five years in jail to follow a life sentence on the kidnapping charge." (S.M. 372-73) (June 5, 1956).

* * * * *

"* * * [A]nd I want you to know that I was very serious and earnest when I said that if you had been convicted by the jury I intended to give you the absolute maximum sentence, a life sentence plus all of these years to follow the life sentence.

"If anybody wonders how one can serve a sentence after he has served a life sentence, it is very simple, because in a life sentence you are eligible for parole in 15 years; but with a sentence to follow a life sentence, you are not eligible for parole on the life sentence, and you have to stay in jail for the rest of your life." (S.M. 375) (June 5, 1956).

[16] At the start of the trial the prosecution announced that it would not ask for the death penalty under the kidnapping count.

It is not claimed—and it is immaterial—that the Trial Judge's statement was designed either to mislead the defendant or to induce his plea of guilty. The question is whether it did have that impact.

The statement by the Court itself had overbearing force. That it had a subtle but nonetheless powerful influence upon the defendant can hardly be questioned. But adding even greater weight to it was the fact, not challenged by the Government, that under the Federal Bank Robbery Act the Court lacked power to impose consecutive
59 sentences to follow that imposed under the kidnapping count.[17] Moreover, this circumstance itself, apart from any question of its coercive nature, raises a substantial question as to whether the plea was understandably made.[18]

We are not here concerned with a situation much debated among the Courts of Appeals, in which some statement, activity, promise or threat of the prosecu-
60 tion has allegedly vitiated the voluntariness of a plea of guilty.[19] Nor is this a situation where a

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[17] United States v. Drake, 250 F.2d 216 (7th Cir. 1957); Simunov v. United States, 162 F.2d 314 (6th Cir. 1947). Cf. Heflin v. United States, 358 U.S. 415 (1959); Prince v. United States, 352 U.S. 322 (1957); United States v. Di Cunio, 245 F.2d 713 (2d Cir.), cert. denied, 355 U.S. 874 (1957); United States v. Tarricone, 242 F.2d 555 (2d Cir. 1957). *Contra*, Clark v. United States, 281 F.2d 230 (10th Cir. 1960). See also, Milanovich v. United States, 365 U.S. 551 (1961); Green v. United States, 365 U.S. 301 (1961); United States v. Poindexter, 293 F.2d 329 (6th Cir. 1961), cert. denied, 368 U.S. 961 (1962); United States v. Donovan, 242 F.2d 61 (2d Cir. 1957). Compare United States v. Parker, 181 F. Supp. 73 (N.D. Ind.), aff'd, 283 F.2d 862 (7th Cir. 1960), cert. denied, 366 U.S. 937 (1961); United States v. Jakalski, 267 F.2d 609 (7th Cir. 1959), cert. denied, 362 U.S. 936 (1960).

[18] Compare United States v. Paglia, 190 F.2d 445 (2d Cir. 1951), *expressly overruled on other grounds*, United States v. Taylor, 217 F.2d 397 (2d Cir. 1954).

[19] Heideman v. United States, 281 F.2d 805 (8th Cir. 1960); Bone v. United States, 277 F.2d 63 (8th Cir. 1960); Kent v. United States, 272 F.2d 795 (1st Cir. 1959); Teller v. United States, 263 F.2d 871 (6th Cir. 1959); Martin v. United States, 256 F.2d 345 (5th Cir.), cert. denied, 358 U.S. 921 (1958); Booth v. United States, 251 F.2d 296 (9th Cir. 1958); Shelton v. United States, 242 F.2d 101, *rev'd en banc*, 246 F.2d 571 (5th Cir. 1957); *rev'd on confession of error by the Solicitor General*, 356 U.S. 26 (1958); United States v. Paglia, 190 F.2d 445 (2d Cir. 1951), *expressly overruled on other grounds*, United States v. Taylor, 217 F.2d 397 (2d Cir. 1954).

defendant and his lawyer accept the realities of fact as developed during the progress of a trial, recognize the force of the Government's case, consult with one another and then the defendant makes a deliberate and measured choice.[20] In such circumstances a defendant and his attorney act upon their appr l of the evidence and the defendant makes his choic accordingly. Whatever his decision, whether to plead guilty or to continue with the trial, if found guilty, the prospective sentence is
61 an unknown quantity yet to be determined by the Trial Judge after an evaluation of all significant factors which normally are considered before sentence is imposed. In the instant case there is an added and distinguishing fact—the Court's announcement during the trial and in the advance of a verdict of what sentence he would impose in the event of conviction.

With the normal strain under which a defendant labors during a trial, greatly intensified by the cumulative impact of the testimony offered against petitoner by his co-defendant, who had become a Government witness, the Court's advance announcement of the prospective sentence and, based thereon, the strong urging of his own counsel to plead guilty, it is difficult to believe that the defendant had that capacity for reasoned choice, that freedom of will which is essential to a voluntary plea of guilty.[21]

62 No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty[22]—that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. To impose upon

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[20] Cf. United States v. Monti, 100 F. Supp. 209 (E.D.N.Y. 1951).

[21] Cf. Haley v. Ohio, 332 U.S. 596, 606 (1948) (opinion of Frankfurter, J.).

[22] United States v. Wiley, 278 F.2d 500, 504 (7th Cir. 1960). See generally, United States v. Wiley, 267 F.2d 453 (7th Cir. 1959); United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960).

a defendant such alternatives amounts to coercion
63 as a matter of law.[23] Such was the holding in *Euziere* v. *United States*[24] upon substantially similar facts. There the Court, upon the defendants' arraignment, announced that in the event they stood trial and were found guilty, the Court would expect to impose the maximum sentences; the Court stated at the time of sentencing that that would have meant sixty years. Significantly, the Court of Appeals not only reversed the denial of the defendants' motion under section 2255, but *without remanding it for hearing* vacated and set aside the judgment of conviction, stating:

> "We think it is clear that the statements made by the trial court were reasonably calculated to influence the defendants to the point of coercion into entering their pleas of guilty."[25]

The Government here professes to see some distinction upon the facts, such as the statement was made before and not during trial and before rather than while
64 they were represented by counsel. The defendants did have counsel when the plea was entered. This Court sees no essential distinction; of anything, the factual situation in the instant case is even stronger in view of the substantial evidence already received against the defendant.

The Court is also persuaded that upon all the facts the defendant has carried his burden of proof. The realities of human nature and common experience compel the conclusion that the defendant was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the

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[23] See People v. Banner, 5 Misc. 2d 355, 164 N.Y.S. 2d 53 (Otsego Cty. Ct. 1957) (dictum), *rev'd*, 5 N.Y. 2d 109, 180 N.Y.S. 2d 292 (1958). Cf. People v. Goldstein, 1 App. Div. 2d 1044, 152 N.Y.S. 2d 330 (2d Dept. 1956). See also, United States v. Lias, 173 F.2d 685 (4th Cir. 1949); People v. Brown, 54 Mich. 15, 19 N.W. 571 (1884); People v. Sullivan, 276 App. Div. 1087, 96 N.Y.S. 2d 260 (2d Dept. 1950).

[24] 249 F.2d 293 (10th Cir. 1957).

[25] Id. at 295.

time he entered his plea of guilty. On the one hand, he was influenced by fear that if he adhered to his right to continue with the trial, if convicted, imprisonment for the rest of his life would follow; and on the hand, by the hope that if he abandoned trial and plead guilty, he would receive a substantially lesser sentence, particularly in view of the implicit understanding between the Govern-
65 ment and defense that the kidnapping charge, the only one under which a life sentence was permissible, would be dropped.[26] The pressures brought about by such a situation are irreconcilable with the exercise of that free will essential to a voluntary plea of guilty.

In sum, the Court concludes that as a matter of law and upon the facts here presented, the defendant's plea of guilty was not voluntary and free from coercion; accordingly, the motion to vacate and set aside the judgement of conviction entered thereon and for a new trial is granted.

Dated: New York, N. Y.
February 8, 1963.

/s/ EDWARD WEINFELD
United States District Judge

(File endorsement omitted)

67 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Motion to Dismiss—Filed May 3, 1963

The defendant Rocco Tateo by his attorney O. John Rogge moves that the indictment be dismissed on the follow ng grounds:

1. The defendant has been in jeopardy of the offense charged therein in the case of *United States* v. *Angelo P. John, Rocco Tateo and Arthur L. Paisner*, in the District

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[26] Compare United States ex rel. Leyra v. Denno, 208 F.2d 605, 615 (2d Cir. 1953) (Frank, J., dissenting), rev'd, 347 U.S. 556 (1954).

Court for the Southern District of New York, Case No. C 149-341, which terminated on June 5, 1956.

2. The indictment was not found within five years next after the alleged offense was committed.

/s/ O. John Rogge
60 Broad Street
New York, New York
Attorney for Defendant
Rocco Tateo

Dated: New York, New York
April 12, 1963.

(File endorsement omitted)

69 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Before:

Hon. Harold R. Tyler, Jr.,
District Judge.

Minutes of Oral Argument, April 16, 1963

Appearances:

Robert M. Morgenthau, Jr.,
United States Attorney for the Government;

Peter E. Fleming, Esq.,
and
Charles A. Stillman,
Assistant United States Attorneys.

O. John Rogge, Esq.,
For the Defendant.

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70 Mr. Fleming: Ready for the government.
Mr. Rogge: Ready for the defendant.
Mr. Fleming: For the record, may the record note that defendant Tateo is present in court.

The Court: Yes. First of all, if we may, let us get out of the way some, shall we say, relatively clear items raised by the defense motions. First of all, as to the motion under Section 3005 of Title 18, as I indicated informally off the record, I will, of course, grant this motion at once. I will endeavor to appoint Harold J. Raby. I will try to ascertain later this evening or tomorrow morning whether or not Mr. Raby is in a position to accept the appointment as second counsel for Rocco Tateo.

Now, as to the problem on your other motion, Mr. Rogge, on 3432, that is the list of venire men and so on, obviously the Statute is clear on that, the only difficulty is the one that Mr. Fleming just brought up, that is, the timing. That turns in part on what the Court does, I suppose, with regard to your motion to dismiss based on the double jeopardy point.

Mr. Rogge: Right.

The Court: And in part on my current trial problems which I had hoped and still do hope we could get started at about April 29, a Monday, two weeks from now just about.

71 It is not exactly certain that we will finish the present case, but why don't we do this. Certainly as I am sure Mr. Fleming and Mr. Stillman know, the law is clear that if we are going to go ahead under what I call the capital count, this special panel procedure must be followed. I don't think there is any doubt of that, do you, Mr. Fleming?

Mr. Fleming: Not at all, your Honor, no, sir.

The Court: So what I am endeavoring to do is figure out as quickly as I can so we can assign a time first for the convenience of the calendar commission, and second so that we can get this list to which the defense is entitled, assuming that the capital count remains in the case.

Mr. Fleming: Yes, sir.

The Court: All right. Now, the next item is the 3500 motion. My recollection is under 3500 if we have a capital case, we do have to turn those over.

Mr. Rogge: Yes, the Statute is clear, if your Honor please, that I am not entitled to those until the witness has finished on direct. But my point here is that

just as a matter of fairness and the expeditious running of the trial, in view of the fact that I am entitled to a list of names and addresses of witnesses, I might just as well have the statements and reports and
72 grand jury testimony now because it will be expeditious as far as the trial is concerned.

I may say to the Court that I plan to present this in the alternative. That, of course, has my motion to dismiss on the ground of double jeopardy. If that is granted, there are a number of these other things we don't get into, but if that is not granted, then there are these other motions, the two that your Honor already mentioned, these are clear under the Statute, the government has conceded it, and as far as 3500 is concerned, although by the Statute I am not entitled until the witness is finished on direct—

The Court: My recollection is that from time to time in this court and other Federal courts, particularly where you have a serious charge such as a capital charge clearly is, that as a matter of discretion that a trial court will accommodate defense by directing that the government turn over the statements earlier than say the Statute requires.

Mr. Rogge: Right.

The Court: My experience with Mr. Fleming and Mr. Stillman has been in previous trials, they are equipped usually to move expeditiously on 3500 materials in the usual sense and I will tell you what I will do.

73 Rather than belabor the point, I would like to think about perhaps going along with Mr. Rogge to this extent: That all those materials which you two gentlemen think are clearly within the ambit of 3500, instead of waiting until the witness gets on the stand, that they be turned over a few days prior to the commencement of trial, but this I would like to think about because it does frankly in my mind turn to a large degree on (a) whether or not this double jeopardy point has any merit, and (b) what the time of our start is going to be.

Mr. Fleming: If your Honor please, as the Court knows my papers were prepared prior to the receipt of Mr. Rogge's papers and this was by agreement in open court at the time Tateo pleaded not guilty to the new indictment.

The Court: I am not cutting you off from any argument, that's why I am just telling you this off the top of my head.

Mr. Fleming: That is why I would like to make my argument now. I think Mr. Rogge is quite correct and the Statute makes no distinction between types of cases insofar as the turn-over of statements.

The Court: Agreed.

Mr. Fleming: I think your Honor knows the in-
74 tent, the Statute is quite specific, it was after the Jencks decision, it was a Congressional decision that these statements should not be turned over until after the government witnesses testified, and I think that is consistent with the privilege that usually attaches to government files.

Your Honor, I certainly cannot consent to any turn over of statements prior to the time the witness whose statement is involved testifies. And I could not consent to any procedure which was other than the procedure set forth under the Statute.

The Court: I understand.

Mr. Fleming: One other thing I would like to say because I understand your Honor's feelings. My feeling and from my experience here is that Jencks problems were arrived when the Statute is diverged from, when the Statute is not followed. It is my experience that when a Statute is followed there is no problem. When the Statute isn't followed, usually by inadvertence and you have an appellate issue. Take the Keogh case, there is a situation where the government consented to turn over all 3500 material as it was necessary and on a rebuttal witness they failed apparently through inadvertence or the report was not available they did not turn over that particular
75 statement and an appellate issue was raised in an otherwise clear trial.

I would submit, your Honor, there is no prejudice to this defendant, capital case or not, by proceeding according to the Statute and I submit that, too, the one way to properly handle Jencks material is pursuant to the Statute in an orderly fashion as the Statute directs. I would really oppose any diversion for that reason.

The Court: I understand you and I would even suggest you may be right in general terms in saying that once

you would deviate from the law as it is written, why, you would become vulnerable to problems that may be unnecessary.

But on the other hand, I would still like to reflect on it a bit for two reasons. One, moving the trial along and, two, which is really part and parcel of the first to a degree, to enable defense as a matter of fairness to move to any cross-examination with preparation and despatch.

So let me just think about this, gentlemen, and reserve decision. I don't want you, Mr. Fleming, to think that I misunderstand you or feel the government should consent, I don't.

Mr. Fleming: My problem is my position is es-
76 sentially this raising of a problem which may occur without anyone knowing they are occurring.

The Court: Certainly I do think perhaps strictly as a technical matter no prejudice would be suffered by the defense if we followed the strict intendment of the Statute. But it seems to me that a trial judge has some discretion and I would like to reflect on Mr. Rogge's motion before deciding.

Mr. Rogge: I want to add just a word on this, if your Honor please. In the District of Columbia it used to be the rule in a capital case that these statements were turned over in advance and I would like to give your Honor the case on this, Fryer against United States, 207 Fed. 2nd.

The Court: I think it has been in a number of districts but I think my proper exercise here is to reflect about this case and what is involved and, of course, as we all know we don't know yet what is involved because we know the double jeopardy motion is here.

Mr. Rogge: I never did understand the government—as a matter of fact, they passed the Jencks Act not so much as to get at the Jencks case but the Fryer case and I just don't understand the government on this.

77 Your Honor has pointed out, and quite correctly, you want to move this thing expeditiously and obviously it can move with great expedition, and can say to me, "You have seen the 3500 material, cross-examine," and furthermore I will be ready to cross-examine.

The Court: But I have that very much in mind. As you know and I say again, let me reserve decision because,

rightly or wrongly, I think it depends on some other matters which we still have to get at.

Mr. Fleming: May I add one thing, your Honor?

The Court: Surely.

Mr. Fleming: As your Honor knows, Mr. Rogge has access to the names and addresses of our witnesses if this is a capital case, that distinguishes it from the ordinary criminal case and would seem to militate against the turnover suggested.

The Court: That could be.

Now, let me ask you while you are on your feet, Mr. Fleming, I am turning really to this motion of the defense which reads as follows:

"The defendant Rocco Tateo by his attorney O. John Rogge moves that the United States be required to elect between counts 1, 2 and 4 and for such other and further relief as to the Court may seem just and proper."

78 As I indicated off the record before we started here this afternoon, I was a little confused by the papers of both the United States Attorney and the defendant as to what the government means to move forward under, that is, which indictment or indictments.

Now, I take it that you want to proceed not only under the superseder of March 28—have I got the right date?

Mr. Fleming: Yes, sir.

The Court: 1963, but also—

Mr. Fleming: That is correct.

The Court: Counts 1, 2 and 4 of indictment number—I don't have the number.

Mr. Rogge: C149-341.

The Court: Is that right?

Mr. Fleming: The government—there are four counts in the original indictment C149-341, counts 1, 2, 4 and 5 to which Tateo pleaded guilty in 1956 and was sentenced and a judgment of conviction was vacated and the government is to proceed on those four counts. The kidnap count was dismissed on Tateo's motion.

If the new indictment, if the reindictment of Tateo on the kidnap count 63 Cr. 299 is held proper the government would move to consolidate the cases for trial

79 as arising out of the same facts.

The Court: That is right. That is what I as-

sumed but I wasn't sure. Now, therefore, Mr. Rogge, I am not sure I understand your motion.

Mr. Rogge: Well, if your Honor please, I am proceeding in the alternative and since I assumed that the government would want to proceed on both, I have made all motions that I thought were appropriate at this time as to both. But some of them are in effect in the alternative. In other words, if my motion which I want to urge upon your Honor to dismiss on the ground of double jeopardy is granted, then we have only the one indictment left.

Now, under that indictment, it is clear that the jury cannot get one, count for 1, 2 and 4 altogether. This is improper. That has been held in a number of cases. They cannot all be submitted to the jury.

If that is true, then I say in all fairness the government should elect now—I am assuming that your Honor sustains me on the motion to dismiss the new indictment—if that is true, then I ask for an order on the government now to elect as between counts 1, 2 and 4. Because under the cases they cannot all be submitted to the jury. If that is true, make them elect now in all fairness.

80 The Court: I am not so sure it is true. When you say "under the cases" are you talking about cases dealing with Section 2113?

Mr. Rogge: Yes, I certainly am. I am dealing with cases for instance like Milanovich vs. United States, 365 U.S., where you have a husband and a wife team. They were convicted of stealing government property and the wife was also convicted of receiving this stolen property.

The Court—incidentally, she got a concurrent sentence, but the Court set it aside and sent it back for a new trial because the government should have elected—it was illegal to proceed before the jury on both the stealing and the receiving.

The Court: Now, wait a minute. Was that a 2113 case?

Mr. Rogge: No, but they relied on that, and that is 2113, Heflin vs. United States in 338 U.S. 415, where the Court held that a defendant could not be lawfully convicted under the Bank Robbery Act, this very Statute, for feloniously receiving and feloniously taking the same property.

The Court says there, Section C with which we are now primarily concerned, came into law in 1940. The
81 Senate report is captioned "Punishment for receivers of loot from bank robberies." The report states, "This bill would add another subsection to further make it a crime with less severe penalties to willfully become a receiver or possessor of property taken in violation of the Statute."

Similarly, the House report states, "Present law does not make it a separate substantive offense to knowingly receive or possess stolen property stolen from a bank and this bill is designed to cover this omission."

This clue to the purpose of Congress argued strongly against the position of the government. From these reports it seems clear that Subsection C was not designed to increase the punishment on [illegible] who robs a bank but only to provide punishment for those who receive loot from the robbery. We find no purpose of Congress to pyramid penalties for lesser offenses.

The Court: I would agree with that but that may well be. But does that go so far as to indicate that the indictment should not lie, meaning it has to be dismissed?

Mr. Rogge: I am not saying that. What I am saying from these cases, if these cases, and Heflin and
82 Milanovich, is based on Heflin, these cases are Supreme Court cases would say that a jury may not get both, that the government has to elect.

I say if the government has to elect, as it must under those cases, in all fairness make the government elect now. If it is prejudicial as it was in Milanovich to have it go to the point of the verdict, and mind you there was argument there in the Court, well, at least it is concurrent, they can strike the penalty for one or the other and leave the other, the Court said, "No, it was improper for the jury to have both." The jury should have been instructed, you can do one or the other, not both.

Now, if it is error as Milanovich says for the jury to get both, I say make the government elect now; not after all the evidence is in.

The Court: I am still a little unclear as to the thrust of your motion. Supposing for the sake of argument Subdivision E of 2113 count was out, that is the superseder of March.

Mr. Rogge: Right.

The Court: Would you say that the government must elect between 1, 2 and 4?

Mr. Rogge: Absolutely. I don't think there is any
83 question about that under Milanovich.

The Court: Do you mean to say he can only go to trial under one of those three counts?

Mr. Rogge: They can only go to the jury under one of those three counts and this is what Milanovich says. If that is true, make the government elect now and not after the case is in and before your Honor instructs the jury.

The Court: All right, what do you say, Mr. Fleming?

Mr. Fleming: In all deference to Mr. Rogge, I don't think Milanovich says that. That was a prosecution under 641 of the National Stolen Property Act and had to do with the theft of government property. He is quite correct that in that case the defendant was prosecuted and convicted for stealing and receiving the some chattels. And he is quite correct that the Supreme Court reversed even though the sentences imposed were concurrent, but what the Court said was that they were reversing and proper procedure was one of two alternatives, either prior to the case going to the jury the government should elect which count upon which it intends to proceed, or the judge should charge the jury that they could convict of robbery or
84 —withdraw that—convict of theft or they could convict of receiving but not of both. In other words, both counts to go to the jury and the jury makes its selection.

There is another point I would like to raise because this is a problem which is present in this trial and it is going to have to be solved. I don't think it should be solved now because I think the law is clear on Milanovich, even reading it to support Tateo. It is clear that both counts may to to the jury upon all the evidence with the instruction that the jury can convict on one or the other but not both.

But in addition, and I am briefing this for trial and I can have it in far earlier than the trial, in case the evidence will show that Tateo planned this robbery, that he engaged in it, and that he received some of the proceeds of it, but also showed that he was not in the bank, so that any conviction for robbery will be on an aiding and abetting

theory. Now, in Heflin, which Mr. Rogge quite accurately stated, except they vacated on the consecutive sentences theory, the man who robs a bank and puts the money in his pocket cannot also be called a receiver because it is the same act. That is the theory of Milanovich.

The Court: That I can understand.

85 Mr. Fleming: We have a distinction here, and I am briefing this, of a man who aided and abetted a robbery and was not in the bank and subsequently received funds, to my mind—

The Court: What you are saying the government proof will be very generally first that Tateo or John planned this but for one reason or another Tateo was not present in the bank.

Mr. Fleming: That is right.

The Court: When the job was done.

Mr. Fleming: Yes, sir.

The Court: But thereafter, apparently the government proof will be, that though that is so he still got some of the proceeds of the robbery.

Mr. Fleming: Yes, sir. Tateo aided and abetted the robbery by assistance given to Paisner. Although not there he subseqnently received the funds. I think it is distinguishable.

The Court: Offhand, I can see the receiving problem and the Hefner case, certainly that is a clear case. I can't be guilty of stealing and receiving when I do the act and put the proceeds in my pocket as I get through stealing. That is something a little different perhaps, but in any event I suppose what the government is really say-

86 ing, they are agreeing with you to this extent, not only as to the holding in the case you cite but also that there could possibly be a problem, but the problem if it arises should be resolved in the form of an instruction not prior to the time when we know what the proof is.

Mr. Fleming: We say that and say that because that is what Milanovich says.

The Court: I can't remember it and I haven't read it since I got Mr. Rogge's brief. I read the brief but not the case. I will have to read it.

But my recollection is that the extent of this problem in general terms as it has come into my ken here heretofore

as a lawyer only, I think that this is a little premature to make any hard and fast rulings.

Mr. Rogge: But this is precisely where we differ. The government agrees it can't go to the jury on all of them but it says the way to handle this is to either elect after the case is in or wait until the whole case is through and handle it by a judge's instruction.

I answer that by saying if they cannot go to the jury, in all fairness, Judge, make them elect before we go to trial.

87 The Court: Well, you see, the difficulty—I understand you and you may be right but the difficulty is that facts alter cases or propositions depend on facts.

Mr. Rogge: That is right.

The Court: Also it is a little difficult to assume now that this is quite the same as the Heflin facts. As I can see offhand, a bank robbery could be an awfully lot different from stealing and receiving government property.

Mr. Rogge: Of course, they make one other fine point here, this is a fine distinction in my mind, well, Milanovich and Heflin applies where it is both a robbery and the theft and receiving of stolen goods. This doesn't apply in the case of someone who aids and abets and receives the stolen goods. I say that that is an a fortiori case.

The Court: Wait a minute now. Supposing I sat in with a couple of men who planned to rob a supermarket and let's say it was agreed I wouldn't enter the supermarket, I wouldn't participate in the stick-up. But for my great brainpower in adding to their plans, I would get a share of the swag.

It seems to me I could be charged with aiding and abetting and also assuming that there is a State Statute
88 to cover this analogous to 2313, I could be charged with both as being two clearly separate crimes.

Mr. Rogge: If your Honor believes, if I understood Milanovich and Heflin correctly, then the Supreme Court would have the job of making plain that the a fortiori covered the situation.

The Court: Has there been any case since Milanovich in which the aiding and abetting count, where the point is argued and disposed of?

Mr. Rogge: I did not find it.

The Court: I can't remember seeing anything myself. But let me reserve decision on this as this really isn't an alternative motion, this goes one way or the other, right?

Mr. Rogge: The election motion is alternative in a sense. If your Honor agrees with me on the double jeopardy point, then we have this election motion. But if your Honor does not agree with me on the double jeopardy point, then, I have another election motion, namely, that they should elect between the new indictment and counts 1, 2 and 4 of the old indictment because those are all merged in the kidnapping.

The Court: Well, I don't know.

Mr. Rogge: Here again—

89 The Court: I would like the sound of your first motion better because I think traditionally in those prosecutions where subdivision E, that is the kidnap section, or the subdivisions have been used, there are almost always other counts going to subdivisions A, B and C, or some of them, isn't that right?

Mr. Rogge: I am referring now to United States against Drake and this is the one that Judge Weinfeld cited, the Court said, "We believe it to be now settled that Section 2113 creates the single offense with various degrees of aggravation permitting sentences of increasing severity," and goes on to an examination of Section 2113, will disclose that Congress intended that the offense is defined in Subsections A and B, that is, count 1, are included in D, that is the new indictment—no, that is count 4 and A, B and D are included in E, that is the new indictment.

Now, if that is true, then I say if your Honor does not agree with me on the double jeopardy point, make the government elect as between the new indictment and counts 1, 2 and 4 are the old indictments.

The Court: Wasn't Drake a sentencing problem case?

Mr. Rogge: In Drake the Court held that a rob-

90 bery which placed lives in jeopardy by the use of a dangerous weapon in violation of 2113 D and the forcing of persons to accompany the robber in violation of E, the so-called kidnapping section, were not offenses consecutively punishable.

The Court: That I can understand.

Mr. Rogge: It was a sentencing problem.

The Court: That I can clearly understand, but I think we have a different problem; it is not an esoteric one, this is different possibly. Because let us assunme this—I don't know what these facts are the government is going to prove obviously but I can imagine without much difficulty that it may well be that—let me take a look at the new indictments—yes, you see according to the superseder it charges unlawfully, willfully and knowingly did force Maria Costelos to accompany them without her consent. And now, factually that may not hold up. Let us say for the sake of argument and certainly isn't the other party a Subdivision E, which is to kill any person—apparently nobody was killed here. So that I can see where you could do two separate acts which woudn't merge, that is you could force someone to accompany you without their consent and could also do something which would some within the ambit of Subdivison B, which would be an entirely different
91 action for purposes of proof and submission to the jury.

Now, of course, we come to sentencing. That perhaps is a horse of a different color as Drake apparently holds.

Mr. Rogge: Well, as I read the cases, the feeling that I gather from them was that at least as far as some of these sections were concerned it provided for consecutively greater punishment and as I looked at the reasoning in the Milanovich and Heflin, it seemed to say to me that they can't all go to the jury. If they can't all go to the jury, let's find out now which one we are going to try.

The Court: You say let's get them out of the case now?

Mr. Rogge: Right.

The Court: All right, I will have to reserve decision. I understand what you are saying to me in the alternative sense, but really the motion is with us one way or the other and whatever happens to the kidnapping—

Mr. Rogge: The motion to elect is with your Honor whatever happens. In other words, if you agree with me on the motion to dismiss on the basis of double jeopardy, then my motion to elect is there as between counts 1, 2
92 and 4 of the first indictment.

And if your Honor doesn't agree with me on what I say is piece de resistance and we saved it for last, then I say the government has to elect between the new indictment and counts 1, 2 and 4 of the first indictment.

The Court: All right.

Mr. Fleming: May I just say one thing on that? It has to do with maximum punishment because I don't want it to be thought that the government is agreeing with Mr. Rogge on the idea of no consecutive sentences or merger. Assuming, your Honor, there were a conviction on the kidnapping count, I don't want anyone to think the government agrees that all the counts merge into the kidnapping count for the purposes of sentencing.

The Court: Why not?

Mr. Fleming: For the purpose of sentencing. Drake case says that. They say that for the purpose of sentencing there is a merger of all the lesser sections into the most aggravated section upon which a conviction rests. The Supreme Court has never said it and there are two circuit court cases in 280 Fed. 2nd and 283 Fed. 2nd, both of which are long subsequents to Drake and both of which discard Drake and say that the kidnapping is not the sub-
93 ject to a merger and I want the government position quite clear on this.

The Court: While you are on your feet, Mr. Fleming, this is perhaps a technical question, maybe it doesn't relate to the motions under discussion but I want to be clear on this.

I have gone over the transcript of the proceedings before Judge Weinfeld, the 2255 hearing, which your brother Stillman was present at and I gathered you were not. But I gleaned from that that at the time this case went to trial before Judge Noonan the prosecutor arose and informed the Court and the jury that they were not asking for the death penalty. Now, am I to understand this time the government is going to ask for the death penalty?

Mr. Fleming: I believe it is going to be my decision to make although, of course, I am always subject to higher authority in the office, in my mind the government will make no such statement as was made at the last trial.

I don't feel that the government has a right to interfere with the jury's discretion. That is subject—

The Court: I am not sure it boils down to that.

Mr. Fleming: The Statute says the death penalty may be imposed only after the jury so recommends. To my

own mind and speaking as an individual, I believe
94 it is my decision and I am always subject to higher authority in this office, but to my mind I don't feel the Assistant United States Attorney has a right to interfere with the jury's discretion in this respect so it is not my intention to make a statement such as was made by Mr. Christie.

The Court: I wonder. The reason I ask is not to tell you how you should prosecute the case. I feel that the United States Attorney is an appointed official by the President of the United States by and with the advice and consent of the Senate and he decides, not the Court, what he is going to prosecute.

What I am trying to smoke out here is where we are going. It has a practical application. If you are going to —this is for the Court and for the defense and indeed the United States Attorney's office—if you are not going to ask for the death penalty, maybe that would have a bearing on some of our other problems and I would like to know because I came across this where Mr. Christie, as you point out, apparently who along with Mr. Debovoise prosecuted it before Judge Noonan, according to the record as I read it before Judge Weinfeld, who said we are not going to ask for it.

We don't know what would have happened because the
case never got that far, but if, and I don't mean to
95 embarrass the government or tell the government in any shape or manner what they should do—that is not my business as I see it, at least at this stage—but I would like to know because it may have a bearing on what we do here. is there any possibility, without embarrassing you and Mr. Stillman personally, that I can get an answer?

Mr. Fleming: I gave my answer, I don't want to commit myself to any statement before trial because someone in my office may oppose it.

The Court: Let us assume you were to do that, would it be appropriate, for example, that if the government decided say, as Mr. Christie did let us say, would we then have to go through the selection of the special panel? You see what I am driving at? I don't know the answer to this.

Mr. Fleming: Offhand, I would say we would because

whatever the government says, and this is really the basis of my position, it is up to the jury.

The Court: But let us face it as a practical matter, if you were to arise in your opening or at some other earlier juncture in the trial and say that I will read you the Statute but we are not about to ask you to make such a recommendation here because we feel— whatever you feel. I think that the jury would be pretty much persuaded by that.

96 Mr. Fleming: My own feeling as an individual is I should not interfere with the jury's discretion. As to having an extra panel, you would still have to ask the jury on voir dire their feelings on capital punishment because I don't think it is within our power or within your Honor's power that they may see fit to impose the death penalty. I think that is where it is.

The Court: Supposing they make a recommendation, I don't have to go along with it.

Mr. Fleming: It is my understanding that you will. From the plain language of the Statute, you would.

The Court: I guess you have an argument at the very least there, "or punishment of death as the verdict of the jury shall so direct." I gather from the indictment that nobody was shot?

Mr. Fleming: Quite correct.

The Court: Well, all right, I don't want to emphasize that. It is not my purpose to try and tell you what to do. I was trying to get at the practical exigencies. Upon reflection, even if you were to do as Mr. Christie did, probably we would have to go along here and go through the special panel requirements, otherwise we do have an essential unfairness to start with, Mr. Rogge, to you client.

97 That is to say, we ought to afford the defense the the challenges as if this were a capital case.

Mr. Rogge: He has twenty challenges, no question about that.

Mr. Fleming: That is right, your Honor.

Then I will drop that.

Mr. Rogge: He has twenty challenges.

The Court: Now, let's get to the last item which I think we have got to spend a little time with perhaps, double jeopardy.

Mr. Rogge: Here, if your Honor please, it is difficult to have a horse-cow case and yet we have one close, Green vs. United States. Let us just see how close that is.

There was a murder case in which the case went to the jury on first and second degree murder and the jury found the defendant guilty of second degree murder and he appeals and it is reversed.

Now the government says, "Oh, we are going back to this first degree murder," and the Supreme Court says, "Oh, no, you don't. He was once in jeopardy and you aren't going to put him in jeopardy on that again."

In other words, we deal here with words which in modern terms are almost as ominous and awesome as in the
98 earlier days as were the word "craven" when we were doing a panel.

Here the awesome word is when the defendant is in jeopardy. Now, there isn't any question in the case and again the government will concede that Tateo was in jeopardy before a jury.

The Court: Well, let me stop you right there. What the government says and this is what I think you mean when you say they agree, that so far as we all know in the traditional sense as lawyers having some familiarity with the problem at least, you are really saying if I can put it this way, there was a period there when the double jeopardy constitutional protection attached. But I think the government argument goes, they will agree with that but they say, oh, it became unattached, as it were, by the developments here.

First, as I understand the government brief, that there was consent.

Mr. Rogge: I challenge that right there.

The Court: I don't blame you but I am trying to sketch out the outline. I think we all agree for the purposes of the argument there for a while there was, if I may use the word, "attachment," is that so, Mr. Fleming, of the double jeopardy?

99 Mr. Fleming: Yes, sir.

The Court: The argument really centers, at least in the place where it centers is Mr. Rogge, I think, arguing that it never become unstuck or unattached.

Mr. Rogge: Right.

The Court: There was no consent in the case ruling and Mr. Stillman and Mr. Fleming argue otherwise.

Mr. Rogge: That is exactly right.

The Court: Well, let's put it this way: Let me spin an argument for Mr. Fleming and here is what bothers me—and I want him to know this—that in effect I am doing a little arguing for you, Mr. Rogge, but only for the purposes of getting at the heart of this matter.

I would suppose that a very, very good argument for the defense here is this: How can you say there was any consent in the traditional unattaching double jeopary sense here where we have a finding in effect by this Court to the effect there was coercion.

Mr. Rogge: Precisely.

The Court: Now, I am sure that the problem here—I am not saying Mr. Fleming and Mr. Stillman that I am going along with this—but my problem arises here, we haven't found any case in point. I understand the cases you cite, those are perfectly fine as to laying out the general principles, but that isn't really the nub of the problem. The nub of the problem here is that on the third and fourth day of the trial Rocco Tateo changed his plea to guilty, counts 1, 2 and 4—

Mr. Fleming: And 5.

The Court: The kidnap count is dismissed. Now, the government has taken the theory, having been dismissed they have got to heat it up in the form of a superseder, but along comes this Court in the year 1963 and says, "No good, there was coercion to get this plea." Is that consent in the double jeopardy sense? That is my problem. You don't have to answer me now, but what I am really concerned here with, you see in your brief you cite Perez, Wade vs. Hunter, Craig vs. United States. Do you remember this case?

Mr. Fleming: Yes.

The Court: That to me is the traditional double jeopardy point that you are trying to make, but it doesn't seem to me to get to the heart of this. What I would like is to find a situation analogous to this one. Have you found one?

Mr. Fleming: No, sir. I would say there aren't any.

The Court: There may not be.

101 Mr. Rogge: I want to interrupt to emphasize—I see the way your Honor's mind is working and let Mr. Fleming address himself to it. This is precisely my position.

Since this was a coercion situation and count 3 goes out as part of that same coercion situation in the Green, count 3 is gone, it is finished.

Now, as a result of the defendant's efforts he gets out on 1, 2, 4 and 5, okay, there will be a new trial as to 1, 2, 4 and 5. There may not be a further proceeding as to count 3, either under the other indictment or in the form of a new indictment because as the Supreme Court put it in the—this is Justice Douglas in the Gori case, which represents the law because he is quoting from U. S. against Ball, "The prohibition is not against being tried twice, but being twice put in jeopardy" unless you have the unusual situation as you do have as to counts 1, 2, 4 and 5, namely, defendant has made a motion which opens them up. But count 3 is gone as a result of the coercion situation which involved the dismissal of count 3. That is through. We can go back as to counts 1, 2, 4 and 5, count 3 is forever gone because as the Supreme Court put it in the case of Fong Koo against United States and this incidentally was the case where the government felt

102 a sense of outrage because the trial judge in what the Court of Appeals thought was an erroneous foundation directed and aquittal and the government wanted that reversed. But the Supreme Court said, "The guarantee of the Fifth Amendment referring to not twice being put in jeopardy, that constitutional provision is at the very root of the present case and we cannot but conclude that the guarantee was violated when the Court of Appeals set aside what the district judge had done there."

The Court: Wait a minute. I am going to swing to doing a little arguing on behalf of the government now just to see if we can focus this further. I am reading from Page 396 of 367, U.S., the Gori case, Mr. Justice Frankfurter, the majority opinion and he says:

"Suffice that we are unwilling where it clearly appears that a mistrial has been granted, in the sole interest of the defendant to hold that its necessary consequence is to bar all retrial."

Now, I suppose the analogy from the government's point of view would be—this is in effect what this 2255 hearing and decision really amounted to, a decision in the interest to the rights of Rocco Tateo and that is all. Is that essentially the government argument?

Mr. Fleming: Not quite because—

103 The Court: In the case of Gori we didn't have the development of the law under what we now know as 2255, as I recall it, although we had analogous proceedings. But what it really boils down to is this, and I understand your argument and it is a good ingenious one if nothing else but it may be more than that.

I will tell you what, I don't think that when Congress enacted 2255 that they ever could have anticipated or did anticipate this fact pattern, and as far as I can find, as we all agree, there is really no case quite on it.

Mr. Fleming: I don't think you will find a case that is on all fours with this. If I may say this, first of all I would like to dispose of a couple of cases submitted by Mr. Rogge.

The Court: Green is all right for general principles, but Mr. Rogge—

Mr. Fleming May I say something about Green because it supports the government?

When this issue first arose obviously I didn't know the answer off the top of my head. In all logic it seems where a count was dismissed on a defendant's motion after sentence on four other counts, which is the usual ordinary pattern, where the count dismissed was one which possibly entailed even on a plea of guilty life im-

104 prisonment, it seems in all justice to me that when the conviction or judgment of conviction imposed on the other four counts was vacated for whatever reason, it seems to me in all justice that we are back where we started. I started with that.

The Court: I understand that.

Mr. Fleming: The first thing that occurred to me, suppose a man was convicted on one count and acquitted upon another and appeals his conviction and there is reversal. Can the government then proceed to try him not only on the count as to which there was a conviction and a reversal?

The Court: Yes, but be careful, you are getting into something else. An acquittal is an acquittal.

Mr. Fleming: I would like to make my analogy because I don't think you will find any on all four. The first thing that occurred to me, if a man is convicted on one count and acquitted on another and appeals his conviction and there is a reversal, can he be tried on both counts?

The Court: I don't think so.

Mr. Fleming: In Green vs. United States he could.

The Court: But not today.

105 Mr. Fleming: That is quite correct.

In Trundle, 199 U.S., it was a case that set the law and said that when a man appeals from the conviction on one or two counts or from a lesser included offense, he opens himself up, if there is reversal, to trial on the old indictment.

Now Green reversed it but Green reversed in a five to four decision, and I direct your Honor's attention to the strenuous dissent of Mr. Justice Frankfurter and I would submit that if there was that much question where there is acquittal, there cannot be any question at all in our case.

The Court: So your point—I must confess I don't really think that even under Gori there is a lot of language which supports the argument that the government is making here but on the other hand Rocco Tateo doesn't feel that way, he spent quite a few years in jail and I suppose he doesn't look at it that way. He says, "Look, I was coerced, Judge Weinfeld says so."

Mr. Fleming: Judge Weinfeld said that Tateo was coerced to plead guilty to four counts. He never in his life said that Tateo was coerced to move to dismiss a count upon which he had every right to proceed with the trial and upon which he faced life imprisonment. Judge Weinfeld never said that, he never implied it and he wouldn't.

106 The Court: But the question wasn't—I understand that obviously Judge Weinfeld was making no holdings here, it wasn't before him.

Mr. Fleming: When Tateo pleaded guilty to the four counts it was coercion and I must disagree with Judge Weinfeld—he had every right in the world to go to a verdict on this kidnapping count and no one in the world, it is not within reason that the government could coerce him to move to dismiss. It just doesn't cut.

The Court: I must say we have this rather peculiar situation, we have to—I agree that there is a little difference between the kidnapping count so-called—

Mr. Fleming: Which is all we are concerned with.

The Court: Well, no, there is where I disagree. I understand the defense motion to go to all these counts, right? In other words, the double jeopardy point as far as the defendant's motion is concerned is not limited to the so-called kidnapping count, am I correct?

Mr. Rogge: If your Honor please, I will have to say that I did limit it to the second indictment. However,
and here I want to answer Mr. Fleming, and this
107 would go to both indictments, I want to answer his
specific—

The Court: Before you do that—I don't mean to cut you off but bear with me. I believe that both of you, the government and the defense, have certainly, as I read your papers, confined yourselves to the argument of double jeopardy on the kidnapping count.

What I am really saying I guess is that having read your papers I believe in fairness to both sides that we should consider this double jeopardy point not only with regard to the kidnapping count but with regard to the counts to which Rocco Tateo pleaded guilty on the third or fourth day of trial before Judge Noonan.

Mr. Rogge: Right, and I want to say in answer to Mr. Fleming in following out your Honor's thought I want to make the argument to both indictments when I reply to Mr. Fleming.

The Court: Perhaps the government will be offended by my taking up the cudgels in effect for the defense, but I think we better do it now rather than have it come out later.

Mr. Rogge: This argument occurred to me in answer to Mr. Fleming's argument that the coercion couldn't involve
count three. Let me point out how this coercion
108 could be involved. You may have a situation where
a defendant feels, and you don't know that he has a jury that is about persuaded his way and what happens? The judge calls counsel in and says "Well," to counsel at least in the case the judge says, "This is a pretty good case and if there is a conviction here he is going to get life and consecutive sentences beyond that" and the defendant,

although he thinks he has a good run for it before this jury, figures "I better play it safe" so he pleads guilty, and I say that coercion includes not only the counts 1, 2, 4 and 5 but also count 3. And in making that answer I can see how the double jeopardy point which I made as to the new indictment can obviously be made as to the first indictment, although I will have to say that I didn't make the motion as to—

The Court: I think you are right. As I said before, I think in fairness to both sides, as I read your papers, you both focused, as I understand, you made your motion quite clearly, to me at least, only on the kidnap count and obviously Mr. Fleming focused on that.

Mr. Rogge: Right.

The Court: But I think since we got serious consequences in here that we had better not stand on
109 formality, we'd better cope with the other counts.

Mr. Rogge: I would just like to add one other thing.

Mr. Fleming: I would like to make my complete argument so if Mr. Rogge wants to finish his I can proceed.

The Court: You finish.

Mr. Fleming: As to this point as to the other four counts I just at this time ask what I think a rhetorical question, that is, if Tateo had proceeded by direct appeal here and there had been a reversal, it is not conceivable to me the government could not have tried him on 1, 2, 4 and 5.

The Court: What do you mean by that? If there had been a conviction and there is an appeal and reversal that is a different ball game.

Mr. Fleming: I would submit and I won't argue further, that Judge Weinfeld's decision in vacating the judgment of conviction was no more than a reversal of a judgment of conviction.

The Court: I see your point but let's be honest about it. Perhaps I am guilty here of getting Judge Weinfeld into the act, I did not mean to at all.

Mr. Fleming: We are talking about his order.

The Court: The theory of what I anticipate
110 as a good defense argument is here—at least as an argument, I am not deciding it in any way, I don't know the answer frankly—

Mr. Fleming: My position on 1, 2, 4 and 5 as to which Tateo pleaded, I would believe that it is just not conceivable that when this judgment is vacated the government is stopped from proceeding. It would be the equivalent to say when the Court of Appeals reversed a conviction on the grounds of insufficiency the government could not retry a defendant.

The Court: I see your argument and you could well be right, at least I will put it this way, I don't think anybody ever dreamed that a result such as was achieved by Mr. Tateo in getting a successful ruling of Judge Weinfeld that that would lead to a position where double jeopardy would necessarily attach. But on the other hand, this doesn't answer our problem. Whether they dreamed about it or not is not necessarily our entire—

Mr. Fleming: I suggest this too that if this position were true it would be impossible to retry someone after a successful 2255.

111 Very briefly as to the kidnapping count, my position is that there is absolutely no evidence in this record to show how this dismissal as to the kidnap count was coerced. If it were coerced, and I don't see how it could conceivably be said that a motion to dismiss as to a count which entails life imprisonment was coerced, but if it were coerced it would seem you would have this situation where a motion to dismiss and the dismissal itself would be void just as a judgment of conviction is and you would be back where you started. But my basic position is there is nothing in this record that would support the position that the motion to dismiss the kidnap count was coerced. Judge Weinfeld found the pleas of guilty were coerced but as to the motion to dismiss I don't feel the record supports this. I think that Tateo moved to dismiss the kidnap count because he wanted to and I don't blame him.

The Court: You see, it is kind of difficult here. I think in fairness that we have got to have this point reflected upon because as you are candid enough to admit, really the thrust of your motion in your papers which Messrs. Stillman and Fleming had to be governed by, I assume really went to the kidnapping count.

Mr. Rogge: That is correct.

The Court: I would like not only to afford them an opportunity to brief it if they would like a little further—
maybe they don't want to—but also you because I
112 am not so sure the answers are entirely clear here,
particularly when you only focus on the kidnapping. Because I think I have two different exercises here, two different arguments pro and con, one as to the counts to which Rocco Tateo pleaded guilty before Judge Noonan and, two, as to this new kidnapping count.

I agree with Mr. Fleming, I am afraid there are no cases on all four even though I am in no position to say that because I haven't exhausted the books.

Mr. Rogge: I want to emphasize, if your Honor please, that it wasn't until Mr. Fleming was arguing as to count 3 that the force of the facts struck me that my argument on double jeopardy could go to the first indictment as well as to the second.

And as far as his observation on Green v. United States being a five to four, I don't think there is anyone in government or out of it at this point who is going to take the position that if you got some situation where somebody goes to trial on two counts and is acquitted on one count and convicted on the other and appeals and gets a reversal, that there is just nobody in government is going to say they can go back to trial on both counts; that is how much Green is the law.

The Court: Let me stop you there, Mr. Rogge,
113 because this is important. Your argument based on
Green doesn't help me for this reason:

There has been for years a sort of theory sometimes called consent, sometimes it is called a mistrial arising out of exceptional circumstances—

Mr. Rogge: Yes, exceptional circumstances.

The Court: This cuts both ways and could cut against you. I am reading now from a text called "Miller on Criminal Law" one of the Hornbooks which I don't really like to turn to but it kind of summarizes the two theories I am talking about. Listen to this:

"If a person has once been put upon its trial before a court of competent jurisdiction upon an indictment or information which is sufficient to sustain a conviction and the jury has been charged with his deliverance and thereafter for any reason the jury is discharged unnecessarily

without his consent, he is entitled to his discharge and cannot again be tried. But if necessity arises that a jury may be discharged without this result."

Now, I would think that one of the government's arguments here so far as the old counts that came into play in the proceeding before Judge Weinfeld are concerned, the argument would go this way:

That Rocco Tateo for perfectly good and sufficient
114 reasons as it turns out brings on a 2255 proceeding which in effect amounts to a holding that the consent or change of plea was improper because it was coerced. He consented therefore to an aborted trial which means that he is now in the position under this rubric I just read from the Hornbook that he can be retried or to put it another way, the 2255 proceeding and the order by Judge Weinfeld of this court amounted to those exceptional circumstances which permit a retrial or permit a retrial without the Fifth Amendment coming into play.

Rather than Green that seems to me is the kind of point you really have to focus on and Mr. Fleming and Mr. Stillman have to focus on.

Mr. Rogge: On that point I would like to take again some language from the four dissentors in the Gori case because I think it represents the law and that is that the question is not as the Court of Appeals thought whether the defendant is to receive absolution for his crime but the policy of the Bill of Rights to make rare indeed the occasions when the citizen can for the same offense be required to run the gauntlet twice. The risk of judicial arbitrariness rests where in my view the constitution puts

it, on the government. When Rocco Tateo was
115 coerced in this situation into pleading guilty to counts 1, 2, 4 and 5, the coercion which was part and parcel of the same ball of wax as it was included a motion to dismiss count 3, that forever got rid of count 3 and maybe, and here I want to make my motion and I can do it in writing, of double jeopardy as to the first indictment as well, because you don't have any situation here where there is any iota of free will and consent of the defendant. On the contrary, Judge Weinfeld pointed out not only was he coerced but he didn't even—Judge Weinfeld went further—he said it might even be that he didn't act with proper apprehension of the law either.

So I think you got the situation whereupon—just let me find that one statement I want of Judge Weinfeld—

The Court: Let's be honest about this though. Judge Weinfeld did not have the problem that we have before us here.

Mr. Rogge: That is correct.

The Court: We cannot assume that he is passing on that.

Mr. Rogge: Right, I don't say that he was. But this is what he did say.

The Court: I think I know the phrase you mean.

116 Mr. Rogge: Yes, this. First he says, "But adding even greater weight to it was the fact not challenged by the government under the Federal Bank Robbery Act the court lacked the power to impose consecutive sentences to follow that imposed under the kidnap count." And goes on to say:

"Moreover, this circumstance itself apart from any question of its coercive nature raises substantial questions as to whether the plea was understandably made."

When you add all that up I say you have double jeopardy as to the second indictment and maybe even as to the first one.

Now, I would in conclusion like to say that there are some further points that the defendant has wanted me to argue such as the Statute of limitation. I have what he feels rather summarily overruled him. With your Honor's indulgence, in view of the fact that he doesn't as yet have the two counsel, may he address the Court very briefly?

The Court: Well, it is a bit unusual. If I understand he has some motions?

Mr. Rogge: I did put in one. He thinks I should argue the Statute of limitation. I haven't.

The Court: With regard to the kidnap count?

117 Mr. Rogge: Yes. He has some other motions that I think it would be well if your Honor heard him enough to accede five minutes.

The Court: All right.

The Defendant: Your Honor, on this point about this consent to dismiss a count I want to bring out this fact, the defendant asserts that the trial judge failed to ask the defendant if he understood the consequences of my dismissal without—

The Court: You mean the dismissal of the old count 3?

The Defendant: Of this count 3.

The Court: The old indictment?

The Defendant: Yes. I plead not guilty and I still would have pleaded not guilty to that count and if he understood the consequences of consenting to a dismissal or if the consent was made, the consent of the defendant and it was made voluntarily especially when the dismissal involved a capital offense we have no Statue of limitations and the defendant would be subject to a reindictment on the same count any time that the will of the government as it is in this case.

The Court: I understand your point. But I don't think that this is a Statute of limitations problem. As I understand it, what you are really saying, as I
118 understand you, you are going to what your counsel just argued for you, that really—

The Defendant: What I am trying to say, your Honor, is that I didn't make the motion to dismiss the count, my counsel did without my approval. He did it on his own. He never said, "Listen, Rocco, here is what we are going to do, I am going to dismiss this count but they could bring it back without prejudice."

He never consulted me about this. How could I know, give an intelligent consent, your Honor, if I never consulted with him about this?

The Court: All right. What is your other point?

The Defendant: A failure to object is not consent and I didn't object and I cite some cases here, United States v. Watson and Varick v. Bigger, 47 Supreme Court. Just because I failed to object.

The Court: The fact that you did not object to the dismissal of the third count?

The Defendant: That is right, your Honor.

The Court: All right, I understand you.

The Defendant: It says here in U.S. v. Lester, 2nd Circuit, that the defendant's waiver of objection to dismissal of the kidnap count was made without under-
119 standing and as a result of fear, misrepresentation and judicial ignorance of his rights.

I am citing the Lester case where this defendant evidently he was—he didn't understand the charge or something to that effect.

The Court: I don't think he had a lawyer, did he?

The Defendant: I don't know what it was. Then U.S. v. Palia, 190 Fed. 2nd, and U.S. v. Tailor, 2nd Circuit, or about the defendant not having the necessary understanding of this, of pleading to counts or making a dismissal, things pertaining to that understanding. In fact, your Honor, at page 7 of Judge Weinfeld's opinion, my counsel swore—excuse me, your Honor, please.

The Court: All right, take your time.

The Defendant: Page 7 where it says, "His counsel likewise swore that the matter was not discussed."

The Court: Mr. Kestenbaum, your lawyer at the trial?

The Defendant: Yes.

The Court: All right.

The Defendant: Where Judge Weinfeld says this
120 in his opinion, your Honor, where Kestenbaum says this at the hearing.

The Court: That had to do, Mr. Tateo, with the consecutive sentence problem as I read that decision.

The Defendant: Yes, but I mean that would—like whether I am trying to show your Honor he never even discussed the other possibility what the consent would mean.

The Court: All right, any other points?

The Defendant: When I pleaded guilty, your Honor, the government said that the consent was made after the imposition of sentence but on Page 340 the government severed count No. 3 as to myself on the early indictment. They severed the count before I was even sentenced.

Mr. Fleming: That was the other indictment, your Honor.

The Court: Wait a minute. Wasn't that true as I read the record with regard to Angelo John?

Mr. Fleming: Tateo was named in the third count on an indictment charging robbery of the Mount Vernon branch of the County Trust Company. That is the count severed at the time of sentence of John and Paisler on this indictment. This count, the third, he was never
121 severed, it was dismissed on Tateo's motion at sentence.

The Court: All right. Anything else, Mr. Tateo?

The Defendant: Yes, your Honor. Your Honor, it is true that I received some money at this but that is all I am

guilty of because when that robbery happened, five hours before I argued and pleaded with Paisler.

The Court: Wait a minute, I want you to be careful, I don't want to go into the facts, you don't have to do that because I don't want you to say anything that might be used against you later.

The Defendant: Yes, your Honor. I jumped out of that car and I told Paisler, I said I don't want anything to do with it and I am going away, I can't do it and I don't—

The Court: I would rather you not get into that because really what we are doing here is legal motions and I don't want to put you in a position where you say something that may be used against you if you go to trial under one or the other of these counts.

So what I really think in fairness to you I want you to confine this to motions of a legal nature with regard to the indictment or whatever.

The Defendant: Well, your Honor, that is all.

122 The Court: Anything else?

The Defendant: No, your Honor.

The Court: All right, I understand your point on this business, you made several points, with respect to the dismissal of the third count, that is the so-called kidnapping count on the old indictment, you went to trial before Judge Noonan but I will consider them along with your other arguments here on the double jeopardy because the two sort of dovetail very closely, at least I think they do. So I will consider them altogether.

Now gentlemen, first of all, Mr. Fleming, do you want to—Mr. Rogge, did you finish, you have anything else?

Mr. Fleming: Just my base position on both motions as to counts 1, 2, 4 and 5, as you know, your Honor, the theory of retrial after a reversal and conviction of a defendant who has been convicted and takes affirmative steps to vacate and vitiate that conviction, he weighs well any claim he has to double jeopardy. I think it is as applicable at a 2255 petition as it is on a direct appeal but that is my position.

The Court: I understand that. But the only difficulty, I wish we had better cases that came close to what we have involved here.

Mr. Fleming: I am talking about 1, 2, 4 and 5,
123 which I have not briefed. I submitted a number of cases on that as to count 3, your Honor. It is the defendant's motion to dismiss, it is beyond my particular comprehension how the record or reason supports the view that a man who moves to dismiss a charge which could entail life imprisonment, a man that makes that motion is coerced to make it.

Judge Weinfeld did not find that, there is nothing in the record to support it and, your Honor, I feel that what happened here, not the consent of the defendant but the initiative of the defendant, a motion to dismiss a count which entailed life imprisonment, consented to by the government I think fits exactly into the result we set out in our brief. I don't have a case, I will continue to look.

The Court: Well, perhaps what you are saying is that it is a little easier curiously enough to see the answer on the kidnap count than it is on the, shall I call them, the less onerous counts 1, 2, 4 and 5.

Mr. Fleming: I would like to brief that.

The Court: I think you should and I invite such briefs as you would both like to put in because honestly you can find comfort for either side in the cases in the way of statements and understandably enough.

124 It really comes down to a policy consideration, I suppose the law turns on that. What Gori says for example as a matter of policy and that means that you don't like the man to run the gauntlet twice unless there has been either consent in effect to the result or exceptional circumstances which would wipe out this policy consideration.

Mr. Rogge: Right.

Mr. Fleming: Or unless he hasn't run the gauntlet and he didn't.

Mr. Rogge: Of course, he ran the gauntlet, the jury was selected. They were in the fourth or fifth day of trial. Judge Weinfeld said fourth. I count five days as I look at the back of the—

The Court: You put it another way, I am sure he feels he ran the gauntlet. He has been in jail since 1957.

The Defendant: That is right, Your Honor.

Mr. Rogge: May 15th the jury was selected, May 16, May 17, 18, that is three more, that is the fourth day and

May 21st, the fifth trial day. Of course, this man was running the gauntlet, that is exactly the point. Don't make him run it again and I feel strongly on that, on the second indictment, and I began to appreciate the force of
125 the argument as to the earlier indictment only during the course of the presentation here this afternoon.

I have to go to Boston tomorrow, if your Honor please, but I always like to comply with the Court's request to see if there are further cases that can be supplied.

The Curt: Well, I don't want you to do a lot of formal work but today is the 16th. Would it be unreasonable to suggest by noon of Friday, the 19th, as to the time when such other papers—

Mr. Rogge: That is still this week.

The Court: Yes.

Mr. Rogge: I won't get back until—I am lucky if I get back on Friday.

The Court: All right, what do you want?

Mr. Rogge: I would want until next Tuesday.

The Court: That is the 23rd. The difficulty here is I don't like to delay, because as Mr. Fleming pointed out, it is not that this is not an important point; it is terribly important but it has a bearing on a lot of practical problems which may confront us such as what we do as to the panel.

Mr. Rogge: Your Honor's time schedule is too tight.

126 The Court: It is not my problem that is bothering me so much as the problem of allowing the panel to move forward because it takes time, as we all know, to get together this panel and we have to give Mr. Borman ten days in advance. I assume that is the rule unless I hear from you, it is still the same.

I will tell you what I think we will do. You take until Monday night next week. Don't ask me why that is any better than Tuesday, but it seems so.

Mr. Rogge: May I suggest this, if your Honor is successful in getting the consent of additional counsel tomorrow I think I could brief him over the telephone on what this point is and see whether he could find some—give him a copy of my brief.

The Court: You are going to be away tomorrow?

Mr. Rogge: I will be here until tomorrow noon.

The Court: Unfortunately, I have got to get back with the blood bank boys tomorrow morning so I will not have as much time as I ought, but if I may have your permission and that of the government, I would like to do this to take care of the problem. We will say briefs, or whatever further papers, by five o'clock on the night of the 22nd.

In the meantime I would like to work out to get
127 assigned counsel and since you are going to be away, may I have your permission to get together with him and Mr. Fleming and Mr. Stillman and outline what we are up against here and what we think?

Mr. Rogge: May I, with your permission, leave a copy of my brief that you could give to counsel?

The Court: It would be a very good idea. Then perhaps your office, I will have them call or have Mr. Raby call your office, to get your phone number up in Boston.

Mr. Rogge: I will be staying at the Statler Hotel up there.

The Court: Perhaps it is just as well so we can move forward. Is that all right with you, Mr. Fleming?

Mr. Fleming: Yes, sir. I don't know what to do about Mr. Borman.

The Court: That is a good question.

Mr. Fleming: I would guess this case could be tried in two weeks.

The Court: I appreciate your saying that, you have said it before and I know you are sincere. The only difficulty is that I wish I knew what your brothers Givens and Gaynor were up against or more likely now we are getting to the point as to how long the defense counsel will take.

128 Mr. Rogge: A capital case I suggest is going to take longer than any other ordinary case.

The Court: Even the so-called ordinary case takes longer than all of us think they should. But I will tell you, I think we can arrange this pretty well and give Mr. Borman time and still fit this case in even if I don't decide this until after I get your briefs which obviously I can't now. I think we can work it out.

But again, Mr. Rogge, with your permission perhaps you and Mr. Raby, let's assume, and I ought to continue to worry about this one, as I see on my schedule unfolds

and I would guess we would probably get under way on May 6th to be honest with you, that is a Monday. That is what I am shooting for now because of these additional problems.

All right, anything else that we should resolve tonight?

Mr. Rogge: May we thank your Honor for listening to us, and since we have been here this long may we have a few minutes in chambers with you, your Honor, counsel and myself?

The Court: Yes.

Mr. Fleming: May the defendant be returned?

129 The Court: Yes.

Mr. Rogge: I notice that his wife and sister are here. May he have a visit?

The Court: Is that all right?

The Marshal: We have a van waiting downstairs

The Court: That is the problem. Have a brief visit as you go out, Mr. Tateo.

The Defendant: Yes.

(Hearing closed.)

Reporter's certificate to foregoing transcript omitted in printing.

(File endorsement omitted)

130 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Before:

HONORABLE HAROLD R. TYLER, JR.

Minutes of Oral Argument, April 25, 1963

Appearances:

ROBERT M. MORGENTHAU, JR.,
U. S. Attorney, for the Government.

PETER E. FLEMING, ESQ., and
CHARLES STILLMAN, ESQ.,
Assistant U. S. Attorneys.

O. JOHN ROGGE, ESQ., and
ROBERT KASANOF, ESQ.,
Attorneys for Defendant.

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131 The Court: On the record.

Mr. Rogge: I want to say briefly that I think the principal thing, as I understand it, that brings us back here is additional argument on the double jeopardy point, and since the additional research has been done by Mr. Kasanof, I am going to turn the argument over to him.

I do want to call the Court's attention that since we last met, a case on which the government—one of the cases on which it principally relied, from which it quoted, the Downham case, has since been reversed in a decision by Mr. Justice Douglas, and the idea in that case is not making the defendant run the gauntlet twice.

There, as your Honor is probably familiar—

The Court: I read the Downham case.

Mr. Rogge: The jury was selected and the Court said he was in jeopardy.

What I want to add to that is the point that should have occurred to me, but it didn't, which I think is a complete defense to Counts 2 and 4, and that is that he has served the sentence, and it was so held in Bayliss, Mr. Kasanof has

developed the point, and since it is primarily his belief which we are here on, I would like to have him make
132 the presentation.

The Court: Let's take up a couple of housekeeping points first. Everybody has been notified that May 6th is the expected day, assuming we are going to go to trial, and I just want to make sure that is understood by everybody.

Mr. Rogge: I want to be heard on that, because if this is a capital case—

The Court: You are going to get a panel. It is not going to be a truncated panel. On May 6th, we will have available, as I understand it, ample talismen or potential talismen to select from, keeping in mind the specific rule which, of course, allows both sides 20 challenges.

Mr. Rogge: I have several problems on that score. One, we are entitled to a list of the panel.

The Court: Right.

Mr. Rogge: And addresses. We have 20 challenges. In other words, if this is tried as a capital case, it has to be in an adversary position on that, and I don't know that one panel is going to be enough, I just have no idea on that.

133 The Court: We have checked into that, and it appears there will be ample veniremen in the pool, and they know that this case is coming.

Now, you are perfectly right, of course, on the other point, namely, that you are entitled to the names, as, indeed, is the government.

You both should have them at least three days in advance.

Mr. Fleming: I have the list now downstairs. I can serve it Monday.

Mr. Rogge: I was asked another question in which I am interested in one alternate I have, but not the other. I was asked what my thoughts were on a jury trial. This is a capital case, there has to be a jury trial. On the other hand, if we reduce to Counts 1 and 5, then it might be a boon to me not to consent to a jury if the government will consent, and I will put that in the record.

The Court: The government must acquiesce.

Mr. Fleming: That is up to the defendant.

Mr. Rogge: The government has to consent, the rules

provide for that. Since the government asked me my views, I am putting it on the record if it is a capital case the jury has to try it. If we are reduced to Counts 1 and 5
134 with the old indictment, it might be a boon to me to waive the indictment and let the defendant tell his story to the court.

Mr. Fleming: I would like to be true. When Mr. Rogge says the jury must try it, I assume he means as the attorney representing Tateo, it is his decision that the jury must try it and not as a matter of law the jury must try it.

Mr. Rogge: That is correct. I am not saying it is a matter of law, I am just saying if the government is going to make that kind of production out of it, then we have to go the other way.

The Court: Let's go back here. Of course, a lot of these problems stem in part, at least, or will stem in part, from what the Court decides with regard to these motions. Let's be candid about it.

I hope to be in a position over the week-end and Monday, perhaps part of Tuesday, to fish or cut bait here on this double jeopardy, and related problems, so in the meantime Mr. Fleming has said that he will do as he says, serve you gentlemen with copies of lists of names and addresses of the prospective jurors.

Unless there is something else, I think maybe we ought to hear from the defense. They raised a point which
135 really isn't reflected in this brief, and that is Tateo having served some seven years, aside and apart from normal double jeopardy principle under the Fifth Amendment, there may have been the added ingredient of a rule which is enunciated in 1st or 2nd Bayliss?

Mr. Rogge: The second Bayliss. During the second Bayliss and rehearing of the first Bayliss is one case. There are three opinions, Bayliss, Bayliss on rehearing, and a second Bayliss case which follows the first one in 147. I call that the second Bayliss case, and I call the other Bayliss A and Bayliss B.

The Court: What I want to get at here is that the government hasn't heard this before, right?

Mr. Fleming: Except in the brief.

The Court: Is it in the brief? I can't remember.

Mr. Fleming: Yes, it is in the supplemental memorandum Mr. Kasanof submitted.

The Court: Yes, I beg your pardon. I am sorry, you are right.

However, you haven't tiled with that in your brief.

136 Mr. Fleming: No, sir. My brief was served before this one was. No, I haven't. All I can say about that right now is that we don't know how much good time Tateo has.

The Court: That is part of what I am trying to get at. There are two things here. I don't know that myself. I would like to know it. I don't know much about the computations, but I don't even know the facts.

Mr. Fleming: I can speak on that. I checked the statutes and as I understand maybe Mr. Kasanof agrees Tateo, because his sentence was in excess of ten years, was given, assuming the right kind of conduct, ten days good time for every month served.

Mr. Kasanof: Can I make a suggestion?

Mr. Fleming: Let me say this: Figuring it out on that basis, and that is the only basis used, when I jotted on my pad from the time he was imprisoned on his sentence until Judge Weinfeld vacated the sentence in this year, he had not served ten years, even including good time. That to me would be dispositive.

Mr. Kasanof: May I say this: First the mysteries

137 of good time calculation are beyond me. I have tried to do it in a number of cases on the statutory basis, but there is also a mysterious thing called factory time, and it would seem to me that is peculiarly within the province of the government.

It is a res ipsa question here, to find out what the actual calculation was. I am sure we would take the governments representation as to what the Bureau of Prisons maintains a record, they are required by statute to maintain a current accounting calculation.

Very frankly, it is the defendant's representation, I find that defendants who are actually in these institutions, keep a very meticulous watch on this, it is like aerial time, everyone is fairly well aware of his service obligation.

The defendant tells me that as of the time of Judge Weinfeld's decision, allowing all the various credits that he was entitled to, he had reached that point where he would, if he were serving a ten year sentence, have been entitled to a mandatory discharge.

So on the factual question, I wonder if the government couldn't much more easily than we develop from an
138 authoritative source what the fact is, what the Bureau of Prisons asserts his credit is.

The Court: I am afraid we will have to ask, that gentlemen, because he has been at Lewisburg, hasn't he?

Mr. Fleming: Yes, sir.

The Court: I was going to say that Mr. Sayler's office might get the answer for you quickly.

Mr. Fleming: We will try to develop it.

The Court: I think we will have to, otherwise we won't have a record, and I want to make sure we are doing the right thing, obviously.

Why don't we do that. What I will plan to do until we hear from Messrs. Fleming and Stillman, if you run into a jam, let me know, and I will—I mean if they give you a hard time delay-wise—I don't think they will— but if they do, let me know and I will call the boss in Washington and get him to expedite it, because we shouldn't let it drift.

Mr. Rogge: I will add this, if your Honor please. I realize that the meritorious good time and other good times that they have are—

The Court: Discretionary.

Mr. Rogge: Well, difficult of calculation, this much
139 I can tell you, but on a long sentence like this, when a defendant with as good a principal record as I understand this defendant has, and I may say I do not get this from the defendant, I am satisfied he is on the ten-year sentence well over the mandatory release point.

I am perfectly happy, I think Mr. Fleming will find out he is mistaken on this, and I will be perfectly happy to take the figures that Mr. Bennett gives him because I just feel that on the ten year sentence he is going to find that he has served—I am sorry, I overlooked this point, but I think it is a clear one.

The Court: If I can interfere to the extent of trying to sharpen the argument here a little, as you know the government's contention essentially to start with, you have to treat not only to counts to which Mr. Tateo pleaded before Judge Noonan, but you have also got to take the kidnap count and treat them altogether as one ball of wax.

Of course, the government also in its brief copies went

the other way, am I not right, Mr. Fleming, your essential argument is you have to treat these all together?

Mr. Fleming: No, sir. That is what the
140 cases say. My argument would be as far as the kidnapping count is concerned, that was dismissed on Tateo's motion. He had a right after sentence, or after plea, to go on to trial on that particular count, and he chose not to, and I can't blame him. Becuase the count was dismissed on his motion and the trial terminated on his motion as to that, I think the general rule is that where a mistrial results from a defendant's action or with his consent applies, and there has been no peopardy on that particular count, or at least the jeopardy that had attached failed.

Alternatively, and I rely on the only case treating the subject here, say essentially what I am saying, and then they say even if that is not true, this is one ball of wax, and to come back to our case when Judge Weinfeld set aside the judgments of conviction, he put us back where we were in 1956.

The Court: Let me ask you. I see that, but there is one thing that troubles me as to facts. Am I right in assuming that what happened was when Tateo made his plea, that is the plea which now has been determined to be coerced, to all those counts except old Count 3, the kidnap count, there was then a hiatus period of some two
141 weeks before this motion was made by Tateo to dismiss, and to which motion the government consented. So that it seems to me we have got one problem here.

Realistically, I think we all can assume that what went on here was this, that when that plea was made and accepted everbody had in the back of his mind, counsel for the defense, counsel for the government, the Court, Mr. Tateo, maybe, that implicit was there would be a disposition, i.e. dismissal, or nol. pros., if not dismissal, as to the kidnap count. But in fact there was not, and it was not specifically raised.

What bothers me is this, that I would assume that there is at least a somewhat logical argument to the effect that now that Tateo has been determined to have been coerced, it could be inferred that he didn't intend to have that count

dismissed, that he still is entitled under the Perez doctrine to go to trial or to go to that jury either for conviction or acquittal.

Mr. Fleming: But he didn't.

The Court: Yes, but what I am trying to spin out as the Devil's Advocate, I am not saying that I am convinced by any means this is right. It is argument which I am not sure either side has coped with here on this point, that if there was a coerced plea, and if there was this time lag, and if nobody said flatly just exactly what was going to happen to Tateo as to the kidnap count, it seems to me the coercive point carries over, but carries over in a way that the kidnap count may be lost forever.

Do you see what I mean? It is very hard to articulate.

Mr. Fleming: I would look at it this way—

The Court: You see, it is different than under our State practice. Under the law of the State of New York, for example, there is a well-settled formula and rubric to take care of these things, there is not much doubt on the record as to what happens in one of these circumstances.

Both the District Attorney and the Court,—the slate is wiped clean, rightly or wrongly, at one juncture on the record. Under our Federal system historically this does not, and necessarily does not have to in most cases, be done. Here we have the peculiar situation that some time elapses before anybody makes a motion, i.e. Tateo, or the government does anything, i.e. consent.

Now, there is the added ingredient, can the government, as a matter of essential justice, dismiss as opposed to nol. pros. a count and later heat it up re-inscitate it.

Mr. Fleming: It is the same thing, Judge, I think.

The Court: I don't know. What I am trying to say is, spinning out these two arguments which may be completely baseless, I am not sure at all. Please don't misunderstand me, these two arguments bring us a little out of the usual fabric of the traditional Fifth Amendment argument, and that is you don't see it in these cases because they don't come close to it.

Downing, the most recent case, doesn't seem to come within a thousand miles of it on its fact, but what worries

me is this: The old cases, particularly Perez, establishes—and I think correctly enough—that really the Fifth Amendment provision on double jeopardy represents a policy. Mr. Rogge puts it and the cases put it he doesn't have to run the gauntlet again.

It is sort of an essential fairness. Against it you have to put the consideration is the public well served
144 under these circumstances in not having Mr. Tateo come up to the mark once again on old Count 3, as well as the coerced counts.

Mr. Fleming: If I may, your Honor. Tateo pleaded—the statement found to be coerced was made on the 18th of May, a Friday, and Tateo pleaded guilty late in the afternoon of the 28th of May, which is a Monday. The jury had earlier in that day been recessed.

The next day the jury came back to continue with the trial, and John pleaded guilty, and it was at that time that the jury was discharged. It was discharged in Tateo's presence. What there was on the record at that time was a plea to four counts of an indictment, and the jury was then discharged.

Then after sentence, as is the usual policy, the open count was dismissed, Tateo making the motion.

I say first of all—

The Court: That is the traditional thing, we all know that.

Mr. Fleming: I say first of all it is not logical and the record doesn't support a finding that the dismissal of a count upon which a man might be subject to death was coerced. I think there is a distinction there.
145 He didn't plead to this count. He moved to dismiss it. On the record that was his choice.

Certainly Judge Noonan's statement if it were coerced only went to the plea of guilty, and that is what Judge Weinfeld found. If you argue the other way that the motion to dismiss was coerced just as well as the guilty pleas were coerced, because this was one ball of wax, this was a termination of a trial, if you take it that way, then I say as I say in my brief, Tateo can't have his cake and eat it, too. He can't profit—

The Court: That to me is all the more persuasive and the practical sense—

Mr. Fleming: Whichever argument persuades you, I adopt.

The Court: We might not come to that because of the chronology here, that is what bothers me. We all know what has been going on here daily, and this has been going on for decades, is that you will have a plea, for one reason or another there is a time lag before sentence, usually for a pre-sentence report. It is traditional, everybody goes through this, Judges, prosecutors, defense lawyers,—no motion on the open count is made until that sentence.

146 The U. S. Attorney usually nudges defense counsel, who is inexperienced, and says "Make your motion to dispose," and he does, and the government says consented to, and everybody is living, I shouldn't say happily after, but they live without any kickback.

But here the odd thing is that when you have what we now have to regard as a coerced plea, because there is a decision saying so, and a time lag, things come out a little differently.

Secondly, though, what I would ask to ask you again is this: Let's forget this thread of argument. What about a sort of an essential unfairness argument, which is this: The government insisted that that be nol. prosed. I recognize, as a practical matter, that is a little thin, because we all know what goes on. But it may not be just a practical matter here, it may be a very serious matter. It may be just simply this, that once the government consents to a dismissal under these circumstances, the law is or should be that it is just too bad, it is overwith.

Mr. Fleming: If I may speak to that, Judge, if you are distinguishing between what went on here and the filing of the nol. pros, then I don't think there is any distinction.

147 The Court: Isn't there?

Mr. Fleming: In my original brief, and I quote Rule 48, and Rule 48 in its history is meant to replace common law, it is quite clear from the rule which reads specifically once a trial has begun a count or an indictment can not be dismissed without the consent of the defendant, and that looks specifically towards this problem, as the cases that have interpreted Rule 48 have said.

The Court: Of course, I am making this whole thing a little difficult because the minute you start to fragment

this for purposes of argument or articulation, you necessarily lose sight of the undercurrent here, namely, that that jury had been discharged, and which of course—

Mr. Fleming: In Tateo's presence.

Mr. Kasanof: If I may address myself to that, that seems to me is our basic turning point in this case, and in this sense only. I think Downham is very much in point, because Downham represents a high water mark.

In Downham no evidence had been taken, all that had happened was that the jury had been assembled, and as the minority points out, far less prejudice.
148 There was far less of a gauntlet Downham confronted. He confronted none. Tateo confronted a real terrible ordeal of trial, as we know from Judge Weinfeld's opinion.

At that point, after suffering that ordeal of trial, he was coerced into a disposition, which was unfavorable to him, with the threat—and I think it is more to remember that the count the government dismissed was the threat count—it was that count which furnished the subject matter of the coercion.

And when the threat count was dismissed that was merely completing what was obviously contemplated.

The government's brief said that Tateo could have insisted on going forward, but he couldn't have, there was no way in the world that that jury at that point could have been reassembled on the day of sentence, and Tateo said, "Well, I am delighted to take the two and a half years, but I insist on a verdict on the merits on the capital count."

It would not really have been possible to reassemble that jury.

Mr. Fleming: Of course they couldn't reassemble the jury on June 15th, but they could have
149 proceeded with the trial after the entry of the plea.

Mr. Kasanof: It seems to me when that jury was separated what happened there was that Tateo had been coerced into foregoing his right to conclude. It is just utterly unrealistic, particularly in view of the fact the dismissed count was the coerced count.

It was the threat of the kind of sentence which would be meted out which would have provided the motive for a plea on the other count, and to separate them and to say that in any sense Tateo was free or situated to go ahead on the

count which he was obviously try to avoid, and with which he had been threatened, is unrealistic.

The Court: Can I interrupt to get one thing clear in chronology. It was May, was it, that the coerced plea was entered?

Mr. Fleming: May 21st, a Monday.

The Court: The previous Friday had been what?

Mr. Fleming: I have to tell you why I say that. The record at the hearing shows that the alleged coerced statement was made in the afternoon of the last day that
150 testimony was taken, and that was on a Friday.

The Court: Which would mean that was the 18th?

Mr. Fleming: 18th, yes, sir. There was no testimony taken on Monday. In fact, the jury was released rather early on Monday, and then at 3:45 on Monday Tateo pleaded. The jury came back again Tuesday, and it wasn't discharged finally until after Crown pleaded on Tuesday.

The Court: In 1957, this all is?

Mr. Fleming: 1956.

The Court: 1956?

Mr. Fleming: Yes, sir.

The Court: I thought the alleged opening of the bank was in 1956. Then it was June 5th—

Mr. Fleming: That he was sentenced. And the count was dismissed.

Mr. Rogge: The notation on the back here shows May 22 as the date.

The Court: Of discharge of the jury.

Mr. Rogge: Right. And June 5th as the date of sentence.

Mr. Fleming: My position is the only thing on the record that he was forced to do was to plead
151 guilty. That jury was not discharged for another 20 or 24 hours, and he could have proceeded, and in the alternative if you find, or if it is found that the motion to dismiss was part of an entire coerced action, then I say Tateo can't have his cake and eat it, and so do the cases, and I might add, your Honor, the cases also say Tateo has the burden of proving double jeopardy. He is asking the Court to find on the one hand that the pleas of guilty which punished him should be vacated because of something

that happened, and a motion to dismiss which he says was also called by a coercive statement, should bar retrial on that count.

He wants it both ways, and I don't think he can have it. Not logically, certainly.

Mr. Kasanof: May I answer that?

The Court: Yes, sir.

Mr. Kasanof: I think that he doesn't want it both ways at all, he wants it one way. He had an uncondition and constitutional right to have a jury impaneled, try him, and render a fair verdict. That right was coercively waived as to his pleas, and we would say coercively waived, and further ratified.

The government took the fruit of that coercion and dismissed these counts.

152 Now, what he says is that when he sets aside the coercion he is back status quo ante, he is where he would be but for the illegal act which was worked upon his will by the Court—that is, the original jury should have concluded. His right to have the original jury try him on all of those counts and render a verdict in a single trial, a single ordeal, was interrupted by a coercive and illegal act.

When he gets relief from that coercive and illegal act, true relief from that can't be given because of the passage of time, you can't let that jury reassemble. If these incidents were compressed into an overnight situation, the correct relief would be to set aside the plea and proceed the next morning without any interruption to let the jury conclude.

But that jury, once having been separated and discharged, there is no way, consistent with the basic policies of the Amendment, and I think the government says that the purpose of the Amendment is not to let the guilty go free, but to protect people from successive trials—now this is a perfect example, and unlike most of the cases cited by the government, this is not a plea before trial, this

153 is not something which relates to pleading matters.

The Court: I would like to stop you right there, because this is interesting to me, and troublesome. The government agrees with the defense, as I take it, and you correct me if I am wrong, that as a threshold matter double jeopardy status did attach in the usual sense that the

jury had been selected, there were two or three days of testimony, and so on.

Then, however, where we branch off here, and you are making the argument, of course, as you just did, namely, that the coercion permeates everything here, and that that is the end of it. Once there has been a determination that that was coerced, and the time lapse obvious, you can not under the Perez rubric really come up with any other conclusion but that he went through it and he can't go through it again.

I understand that.

Now here, though, as I understand the government, the government's argument is that the 2255 proceedings successfully can be analogized to a number of things, it can be analogized to a successful overthrow of a conviction upon appeal. I am really troubled by this, Peter, because
154 actually, as a matter of logic—law isn't always logic, I guess—but as a matter of logic, here is what troubles me. Unlike the traditional double jeopardy situation in an overturning of a conviction on appeal, what happens is the defendant does get his right to go to the jury in that occasion and gets a soluition from them. When he goes up on appeal, he is really saying errors were made. Ergo, if the Court of Appeals agrees they wipe it off the record. That isn't quite what happens here, and this troubles me just as a matter of cold logic.

Unfortunately, as you know, what happens in these decisions, nobody thinks in advance of what can happen. This is no criticism, obviously.

For example, I am very unhappy with some of the language of Judge Weinfeld in his decision, because it would be nice if I knew more of what was going through his mind, but he, of course, couldn't necessarily be anticipating this problem. It would be nice to know, for example, in Perez, if they could have anticipated what is going on in the field of 2255 applications.

Do you see what I am talking about logically?

Mr. Fleming: Yes, sir.

155 The Court: The other thing is this. As we all know, once we agree, as we all do, that there was a threshold attachment of the traditional double jeopardy, that the only way you can remove that, or esculpate it under the old cases, sometimes it is called waiver, or sometimes

it is called consent, but of course Brothers Kasanof and Rogge immediately say, "That is the point, there wasn't any. Coercion, how can you say waiver or consent." And they carry this not only to the kidnap count, but to the other count.

Mr. Kasanof: Might I pose it in this way: I would like to know how the government would feel if you had a decision that there was a coerced consent to a mistrial. In other words, in the middle of the trial, the Trial Judge says, for reasons that don't have to appear, that he doesn't choose to conclude the trial and he said to the defendant, "If you persist in going to the end of this trial, I think you ought to move for a mistrial, counsel, and if you persist in going to the end of this trial your client will get X consecutive sentences," and so forth, and counsel then says, "All right, I consent to a mistrial, under the gun."

It seems to me that the fact that there was a plea
156 of guilty and a dismissal is really not as important as the fact the termination was coerced. If this had been coerced, a coerced mistrial, I don't think there would be any question.

Suppose there was a mistrial as to three counts, and another count remained open, nothing was said about it, and the jury was permitted to separate. It would seem to me that that is the factual situation you have, once these pleas of guilty are set aside on the grounds that they were coerced.

The termination of the first trial was a coerced termination, and it couldn't be effective to waive Tateo's right to go but once in front of a jury and suffer the ordeal of trial, and this is not in this particular case an academic discussion, there was a very grueling trial for Tateo, it was exactly the sort of successive attempts and successive ordeals he is now being asked a second time to stand trial for a capital case.

I think the Downham case indicates how sensitive the Court is to this, because in Dowham it wasn't any ordeal, it was formalities, the drawing of the jury, but Tateo went through days and days of a grueling trial on a capital case,
he abandoned his right to conclude that under the
157 gun. That doesn't seem to me to be quite the question of having his cake and eating it, too. He didn't

have much cake to begin with, he hasn't been eating cake for years, and I don't think the government should be in the position of forcing him to this peril again.

I don't think it is a completely apt analogy to call it cake and eating it.

The Court: I think what the government is arguing—

Mr. Fleming: I would like to address myself to what Mr. Kasanof raises. He talks about coerced mistrial by the action of the Trial Judge. I think we really come to two things to be considered here, one is Tateo's rights to avoid second jeopardy, and the other the public's interest in the proper administration of criminal justice.

In the case that Mr. Kasanof raises, I would say that there would be no jeopardy, and I will say why I would say it. It is particularly appropriate here, the key thing in Downham, so far as I am concerned, there are really two key things, one is that the Court's action in discharging that jury, and then calling another jury two days later,

158 directly benefited the government because they had a witness that was missing. In other words, his action furthered the government's cause and took them off the spot.

That is one.

The Court: Or to put it another way, certainly in this case, Tateo, there is no shred of evidence that, (a), the government did anything improper, or that there was some unfair benefit to the United States.

Mr. Fleming: Precisely, your Honor, and that is what I am getting at.

The Court: That is clear. I don't think Mr. Rogge and Mr. Kasanof are arguing that.

Mr. Fleming: That is what you come down to. I don't think you can read any double jeopardy case and find a situation where something happened against which the government couldn't protect itself, and which didn't in a very direct way put the government in a better position than it was before it happened, where the Court has held there was double jeopardy.

Now, the same thing goes to this dismissal of this plea, or this kidnapping count. When the government consented to the dismissal of that kidnapping count, or when they

allowed that jury to be discharged, there was no
159 reason in the world why the government should know or should doubt the bona fides of Tateo's plea.

Mr. Kasanof suggested that when the government consent to dismissal of that kidnapping count they were doing no more than giving Tateo his due because he pleaded guilt. I say that is precisely right and there was no reason why they should do otherwise.

So far as the public and the government was concerned, Tateo had pleaded guilty under those four counts, and it was not in the interest of justice to proceed with the trial.

I would wager if any United States Attorney knew that Tateo's plea was a coerced plea, there is no question in the world they wouldn't have accepted it, would have asked the Judge not to accept and would have gone on with the trial, and as Judge Weinfeld said, the finding this plea was coerced was a subjective finding and certainly was not apparent.

The Court: Yes, that is right.

Mr. Fleming: I think that is what we come down to.

The Court: On the other hand maybe you are going to say this, so I will allow you to go ahead.

Mr. Kasanof: I think we ought to distinguish
160 the whole thrust behind the policy of the jeopardy rule from things behind the rule. The jeopardy rule is not simply designed to make the government and its officers behave or not behave in a certain way, it has that incidental effect, but the real policy of the rule, it is not a fault rule, it doesn't say that if there is a double jeopardy through the fault of the government or its officers, it says that in a free society the ordeal of a criminal trial is so grave that no matter what happens, with the exception of great emergencies, extraordinary emergencies, we are not going to require defendants to go again and again through this ordeal.

The protection is against the jeopardy. It isn't against the punishment, it isn't against the judgment, it is against the jeopardy. And I think we will concede that the government, at least the United States Attorney, was not a causative factor here as far as it appears, but we are not arguing a sporting contest theory here, we are not saying that they were gentlemen, and because they are gentlemen, the defendant Tateo now has to face this ordeal again.

We are saying there is a flat policy against subject-
161 ing citizens to this ordeal. There are very, very narrow exceptions to it. None of those exceptions apply.

He relinquished a constitutional right. He didn't knowingly and intelligently relinquish that right, he was coerced into relinquishing that right. We have judicial recognition of that fact. That being the case, his relinquishment was ineffective and it may be that in this case there is no way to remedy it, but if the choice is between remedying it by subjecting him to a second jeopardy—and I feel a certain sympathy as an adversary for Mr. Fleming's position, what he is saying to the Court in essence is, your Honor, we were blameless, why should we who now wish to represent the prosecution in this case, suffer the penalty, and what we say to him is that he is not suffering a penalty, he is merely suffering the incidental effects of a firm policy.

He doesn't really object or deny that the plea was coerced. He doesn't deny that, but for the plea the trial would have concluded with a jury verdict. He simply says that since he didn't make the mistake he feels it is unfair that he should not have another chance. But this is a different situation.

Mr. Fleming: No, I am misunderstood, your
162 Honor. I think on any logical view my feeling is that Tateo should be tried again, and the position I take in so far as the government's blamelessness is directed towards the cases. I am talking law when I talk that, not logic.

The Court: We all understand that.

Mr. Fleming: Or emotion.

The Court: No, no. And certainly you can find a lot of case law to support you. But Mr. Kasanof is aware of that. What he is saying is that as a matter of logic, irrespective of fault on the part of the government, or anyone else, the double jeopardy is a policy consideration which really analytically had nothing to do with this, even though the cases have gone into it.

Let me put up another one to you.

Mr. Fleming: Could I say one thing on this, Judge, before you raise something else. The argument that they seem to be making is that Tatoe should not be forced to

run this gauntlet again, to go through this ordeal, the anxiety of a trial.

The point is, and I think it is the only point, is that he has asked to, and this is—

163 The Court: That is what I want to tilt with a little.

Actually, I think if I were on the defense side, I could think up smart answers to the proposition that this argument of yours is coldly logical. But that doesn't mean it isn't persuasive, and I want to badger the defense a little.

In other words, as I understand it, what we have been styling the government's statement of "your cake and eating it, too," argument, really amounts to this, that what takes this out of the traditional double jeopardy situation is quite obviously that unlike the law pertaining in the day of Perez, or indeed even as late as Goury, we didn't have any situations where we had a ruling like United States v. Tateo, that is, Judge Weinfeld's opinion, where under a 2255 application Judge Weinfeld was saying quite clearly, though there was no fault on the government's part, there was a deprivation of a constitutional right to Rocco Tateo by reason of an unintended but necessarily subjectively speaking coercive plea exacted.

Then the government says, all right, what really happened in Judge Weinfeld's decision is that Mr. Tateo's—this evil, this deprivation, was exculpated here, and every-

164 body, including Tateo, was put back where they started. Ergo, it follows that we don't really have double jeopardy at all in the classic or policy sense, we are right back where we were prior to what happened on Friday, May 18. That, therefore, there is no double jeopardy. We marched forward.

Now, that argument, admittedly, just to get rid of one argument which I am well aware of, is not completely logical, not completely, but since I am persuaded that to a degree the whole Fifth Amendment double jeopardy concept is founded on largely policy considerations, I don't think the government's argument is just a willow-the-whisp, it is a substantial one and perhaps the one that troubles me the most, frankly, because I have the feeling—and this is terribly fair in the direct sense, to Judge Weinfeld, because obviously he couldn't anticipate all

this, and it wasn't his obligation to do so—but I had the feeling he had in mind he was doing just this when he made the ruling he did, and, therefore, since that was a sensible feeling, if he did in fact have it, it fortifies the government's argument in this practical sense, that Rocco Tateo is back, this constitutional defect has been
165 removed like an ulcer or a cancer, and here we are.

Of course we are here seven years later.

Mr. Kasanof: Putting aside the seven years in Lewisburg, I would like to address myself to that first by saying I am confident that if Judge Weinfeld had had to decide this case under the English system where no retrial were possible, though it might have been more troublesome as a matter of personal conscience, I don't doubt for a moment from his opinion that he was convinced that the Judgment couldn't stand and he would have struck that judgment.

I think the important thing here is what it really means in this case to cure the defect, to remove the constitutional impediment, what the status quo ante really means.

It seems to me the government's position is much like a defendant who comes on habeas corpus and says a confession has been beaten out of him. The government says, all right, you have gotten your conviction overturned on that basis, we will try you again and put the confession back in.

You can't separate the plea. The plea exists to do two things.

The Court: That analogy isn't exact, because
166 there you would be putting the fruits of a defect back in the case through the form of an illegal confession.

That isn't what we are doing here.

Mr. Kasanof: I press this in this sense, that that is exactly what the government is doing, because the government turns its argument from the plea of guilt forward to the sentence, but I think to look at what the plea of guilt represented, it represented two things: It represented the termination of a jury trial—

The Court: That right to him in the traditional U. S. vs. Perez sense, to get a determination from the jury. That is your argument. Is that right?

Mr. Kasanof: It represented not only—the plea did two things, it terminated the jury trial and formed the basis of the sentence. The relief which was given has relieved him of the sentence. There is no way that he can be relieved or made whole as to the right to have one jury, to face one jury trial and have one ordeal of trial, and that being so, there is no way to magically transport ourselves back, reassemble that jury. It is wholly unjust, and sequarely against the very policy which motivated the amendment.

167 This Court points out, I think it is well established, that the real history of the amendment goes to previous convictions and previous acquittals, previous judgments, previous trials, and most of the cases which are cited, and the one case which is only dicta, doesn't deal with this, and as it is presented here I don't think there is any decided case I have been able to find except dicta in one Washington case where the case was not before them, when you have a man who has undergone the ordeal of trial and was forced to abandon his right to have only that one ordeal. You can not separate—

Mr. Fleming: Of course, every time there is a reversal you have that situation.

Mr. Kasanof: No.

The Court: Not analytically.

Mr. Fleming: I understand your distinction, he did get his verdict from that jury, but let me give you this analogy. I suggest every time a defendant moves successfully for a mistrial after a jury has been picked and evidence has been received, just by definition that motion is in a sense coerced because if granted by definition it proceeds from some illegality which has intruded itself into the

168 trial either on the part of the Judge or the government. That defendant or defendant's counsel, who is sitting there and has just been hit with something that is highly prejudicial, and which a Judge has perhaps allowed into evidence illegally has to make a decision, do I give in and move for a mistrial, or do I take my chances with this jury.

The Court: But he has free consent. What permeates this whole case is the coercion point.

Mr. Fleming: Can I continue?

The Court: Yes.

Mr. Fleming: He is no less free than Tateo was. Tateo was threatened, supposedly. Tateo had to make a decision. He could give in and plead guilty and end the trial, or he could get the verdict he wanted from this jury and take his chances. I think he was in exactly and logically the same situation as is the defendant and defendant's counsel who is prejudiced by illegal evidence and has to decide whether he will take his chances or whether he will terminate this trial.

The Court: I understand you, but I would assume that the analogy is not quite complete for one reason
169 which I am sure you are aware of, and that is this: Normally, when a mistrial motion is made by defense counsel there is the free, uncoerced choice.

Mr. Fleming: That is my choice.

The Court: You are saying, of course, and it is an ingenious argument which I hadn't thought of that in a sense you are always coerced, but you are not coerced by Judge, or prosecution, in a direct sense.

Mr. Fleming: Usually you are.

The Court: You say indirectly.

Mr. Fleming: No, directly, because the Judge leans down to the jury and says, "By God, this witness is telling the truth, and he is an accomplice witness." Your chances of acquittal practically go out the window. But you are in a real sense coerced into moving for a mistrial. And I think there is a valid distinction.

Certainly, Judge Noonan did not bend his arm and say "I am going to decapitate you today unless you plead."

The Court: And we further know he didn't even intend to coerce him.

Mr. Fleming: Precisely. And he couldn't protect himself at the time the plea was entered because that voir dire was as unequivocal as any could be.

170 Mr. Kasanof: I think this is a very interesting and illuminating example, and I am delighted the government chooses to advance it as an argument, because I am sure everyone who has defended a criminal case has been confronted with the situation where you have a jury, and things seem to be going well for you, and something which represents a departure from the customary mode of trial

occurs, and you then sit and decide as a tactical matter whether to take your changes with this jury or forego it, and there you really are waiving it. You are saying, I don't want to conclude this. It isn't that you are forced to make the motion for a mistrial, it is that you choose to make the motion and to try again to get antoher jury.

Here the coercion, the pressure, went not to the chances of the jury outcome. No one has suggested in Judge Weinfeld's findings or anywhere else that there was going to be a coerced verdict of guilt here. The coercion went not to the jury, and that is where the coercion goes in a mistrial decision, and it is to avoid an unfair verdict that you say I would rather take another, I will waive my right to have one jury, I will try again on another day.

171 But here the coercion was directed at the defendant to have him abandon the chance that he was apparently willing to take.

Now, he knew the strength of the government's case. This is a case in which the government's principal witness here was not an undercover agent, whose identity was strange to him, this wasn't a surprise. He had a pretty fair idea of the strength of the government's case. He knew that he was on trial for a capital crime. He hadn't pleaded guilty before the trial began. And the pressure exerted itself on his will, and he abandoned his right.

I think it is completely different than the usual choice. Given his choice it appears in the record his choice was to have that jury render a verdict, and there is every indication, and I think as a practical matter you can infer, that this is a case in which the defendants might well have pleaded guilty.

One of them had already become a government witness. I think it is obvious in a case of this sort that this isn't an arm's length matter which suddenly just pops up on the trial calendar. He had elected in the face of

172 the kind of knowledge the government was going to produce against him to stand that ordeal. When it was terminated by a coercive action on his will as to his choice of going to the jury, that termination was the termination of that trial in a jeopardy, and there is no way to unstick that, there is no way that when he asks

for relief, if you give him the relief and recognize that his will was bent, whether intentionally or not, when his will was bent it was bent into abandoning his right to have that jury concluded.

The Court: I would like this argument better—I understand you, but here is a summary of part of that argument of yours, and this really has fascinated me, because I never knew it existed.

I am looking at Paragraph 1.08 of the American Law Institute Model Penal Code, and this points up what you have been saying, and it also points up what I have been trying to say that analytically it is hard for me to be sure that the government's argument, although it appeals to my body juices, is quite sound on a strictly logical basis. Listen to this, Subdivision 4 of that section of the Law Institute, proposes the following: "The former
173 prosecution was improperly terminated." This is one of the four categories where a prosecution is barred by an earlier one, and it says as follows: "The former prosecution was improperly terminated. Except as provided in this subsection this is improper termination of a prosecution if the termination is for reasons not amounting to an acquittal and it takes place after the first witness is sworn, but before a verdict. Termination under any of the following circumstances is not improper." Now those circumstances are: "(A) The defendant consents to the termination, or waives by motion to dismiss, or otherwise his right to object to the termination."

Now, of course, this centers the government's argument, right?

Mr. Fleming: Just on one count.

The Court: Yes, kidnapping.

Mr. Fleming: Yes, just on kidnapping.

The Court: "B: The trial court finds the termination is necessary because (1) it is physically impossible to proceed with the trial in conformity with the law or (2), there is a legal defect in the proceedings which would make any judgment entered upon the judgment reversible as a matter of law or (3), prejudicial conduct in or outside the
174 courtroom makes it impossible to proceed with the trial without injustice to either the defendant or the State, or (4), the jury is unable to agree upon a verdict or

(5), false statements which are made on voir dire and which prevent a fair trial."

Now, you see, though obviously that is not the law necessarily today, it gets to the heart of this argument except for one thing, it doesn't take into consideration possibly in the direct sense this consent by reason of making a motion to exculpate the coercion that the government argues, or, conversely, it doesn't treat directly with the defense coecion argument as permeating everything, including the later motion by Rocco Tateo to dismiss the kipnap count.

Mr. Fleming: Could I say one other thing?

The Court: Surely. I need all the enlightenment I can get. It must be obvious to you all I am a little distured and unsure, because it is very hard to come to grips with this, when you treat all of the counts as one fabric, one seamless hole, or if you separate them with a kidnap count here and the other four counts there.

Go ahead.

175 Mr. Fleming: Here is Justice Douglas. He is talking about double jeopardy as an historic guarantee against double jeopardy, and he said the underlying guarantee is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense. That is one.

I would say that there is nothing of that sort here. This is not a repeated attempt to convict Tateo. I think that language goes directly to the proposition that a man is acquitted and can't be tried again.

Then he says "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

I think that is what Mr. Kasanof is talking about. He says that Tateo should not be forced to run the gauntlet again. And that, your Honor, I think this idea of waiver entrenched as double jeopardy has come into play: Tateo says he has been a victim of a particular action of a Trial Judge, and as a result he involuntarily pleaded guilty.

He has chosen to act to set that aside, and I say he waived whatever rights he has to avoid a second ordeal.

That is what that waiver means, I think.

176 The Court: I understand you, but let me make one observation: I suspect that when the Court, be it the Supreme Court or whatever, has made this kind of a statement, they are not thinking of just the government in the sense of the prosecution or executive arm, they are thinking of the judicial arm, for example. It could be argued that if a Court says a Court can't harass a citizen, either in the form of coercing him or of heating up another mess of the same brew once he has been coerced, but got it set aside, you see, so you don't come out with clear answers.

Mr. Fleming: I would like to answer who bears the responsibility of judicial discretion. Judge Waterman, in his Circuit, said the risk of judicial indiscretion must be borne by the government, meaning the prosecution, and he was dissenting in the Goury case.

What a dissent proves to me is what is said there, rejection by a majority.

Justice Douglas said he was dissenting.

The Court: I am not sure I agree with that. I don't think that the law is that—I don't know as I agree
177 quite with the way it is put. I think double jeopardy is not simply a tool of protection against executive or prosecutorial harassment, it is against all forms imaginable of government harassment.

Mr. Fleming: I submit the Gory case to your Honor, and put Downham against it, and you can see the difference.

The Court: I know. I am agonizing because the trouble is, as is always the case, people write things which sometimes other people wish they didn't write, but that doesn't do us any good. That is true and always will be true.

Mr. Fleming: Gory draw the issue—it is clear and ends with the note they are reluctant to tie the hands of a Court which wanted to confer a benefit, an additional protection, a sensitivity to the defendant's rights.

The Court: It seems to me that Gory goes no further than saying that we will not, where a Court is endeavoring with undue vigor to protect a defendant, we won't go so far as to say that that will always forbid a second trial. But I think that if you put the question in terms—again I think the government is taking the position that
178 this is a regulatory thing I would say that the basic policy is itself a protective and prophylactic thing

to the citizen. I don't think it makes the slightest bit of difference from what source the first jeopardy comes. It is the citizen who is being protected against successive trials. This is not a rule of fault, this is a protection, and I think that that is why it does not matter whether this was an objectively or subjectively coeced thing, it doesn't matter that the government had no fault, and if the government had known or had been aware of what was going to happen it would have moved differently. This is a protective thing.

And I think Downham really indicates how sensitive the court is to the successive ordeal situation.

The Downham case represents just exactly the situation which someone whose guilt is apparent, that is, a jury later convicted him—escapes completely free, is discharged on the Supreme Court decision, simply because one jury was impaneled without a witness being taken and through the merest inadvertence a delay of two days intervenes before his second trial.

Here we have a dealy of seven years, all of the prison term. We have a coercive action worked on the de-
179 fendant's will to deprive him of a constitutional right.

This is exactly the sort of thing in which no matter what the cause, the underlying policy against successive running the gauntlet applies. You couldn't find a stronger example where a man ran a gauntlet and lay wounded and injured for seven years, got up his strength, and the government now says when he gets up his strength he is asking for another chance to run down the gauntlet.

Mr. Fleming: Certainly, seven years is not the gauntlet we are talking about, I don't think. I would think it is not relevant to a decision in this case.

The Court: It is only relevant in this sense. It is relevant to the other argument of course, obviously. That is the serving beyond the mandatory release date, the Bayliss argument. I suppose it is relevant to a feint degree in this regard. I will be perfectly candid, I probably shouldn't say this, but if I thought I should decide this the way I think as a matter of reaction what the law ought to be under these somewhat unusual circumstances, I would agree with the government on the four counts. I wouldn't agree with the government on the kidnap count. In other

words, though it is a matter of what has gone over
180 the dam; there is every argument on that kidnap count from the government's point of view, somehow I don't think that is the way we should—I have always worried about this business of dismissal of counts, and then heating them up years later, no matter who is at fault or what is at fault. But, of course, I can't decide this on the basis of what I think ought to be, I have to follow a somewhat—

Mr. Rogge: In a sense, on the idea of running a gauntlet, this double jeopardy rule, the government is so powerful that the policy is in a sense that while the man is running the gauntlet the government has one hand tied behind its back, but that is what the constitution says.

Mr. Fleming: I would like to know how in any way whatsoever the government has contributed to him running a gauntlet twice.

Mr. Kasanof: None.

The Court: I think you can put that out of the case. I don't think the government, in the sense you use it, understandably thinks the prosecution has done anything.

Mr. Fleming: Period.

The Court: Period. I don't think the defense is arguing that.

181 Mr. Rogge: No.

The Court: If that were the only problem, that would be easy. I agree with you, I couldn't agree more.

Mr. Fleming: It seems to me that ends it, Judge.

The Court: No, it doesn't. I wish it did, because frankly my own sympathies would be that the rules ought to be clear in this area, and I think it is too bad that because of historical consideration, or otherwise, we are in such a muddy area here. I don't think it is fair to the United States, both in the prosecutorial sense, and in the public sense, as well as I think it is any more fair to Rocco Tateo, or people like him, no matter what their actual guilt may be. I think it is just too bad. But that is neither here nor there. I have got to face up to it.

I can't think of anything else you can add, gentlemen. You have covered all the bases. I am grateful.

Mr. Fleming: Could we go just a little further, as long as we are at that point—

The Court: Don't be carried away. I am going to decide the case the way I say I wish the law were.
182 I have to face up to it, what the law is, not what I like it to be.

Mr. Fleming: Talking about what the law is, I think we come some place when we agree that the government, meaning the prosecution and the public, is in no way responsible for forcing Rocco Tateo to run any gauntlet twice.

The Court: This Court was responsible.

Mr. Fleming: Yes, sir, and I would submit that on the law Gory answers that. And I would also say that there is just not any cases, and I think I read them all, where judicial indiscretion has been imputed to the government. Gory expressly rejected that.

The Court: If it did, I am not persuaded unless—well, I know, I have read Gory, it isn't on all fours, so I don't think they were talking about the same thing.

What I think we have to be confined to, and I don't blame you at all, Peter Fleming, I would do the same. I thought like that when I was an assistant U. S. attorney. I have no doubt Mr. John Rogge felt the same way, but I don't feel that is the answer. I think that what the constitution talks about is government, meaning government in all of its phases.

183 Mr. Rogge: I submit there is no question about that.

The Court: I don't think there is, either. I might even regret that. But it is true, I think, and I don't want to duck it.

Let me ask you one more question. I am not sure I understand your Rule 48 argument. For years, as we all of us sitting here know, the government has on occasion—and they do it mostly in 318—and in some instances come in and dismiss, in some instances come in and ask the Judge down there to nol. pros. There is a distinction here somewhat.

Mr. Rogge: That is right, Judge. I wanted to follow up on that. I had a case, it is the Broderick case, I had a case where I made a motion to dismiss for lack of prosecution, and the Government came to me and said, "Will you hold up on this a couple of days because we may come in on a nol. pros."—and they came in on a nol. pros. with a

plan of their own, so no matter what the distinction may be, the government draws a distinction between nol. pros. and dismissal, so when Mr. Fleming says dismissal encompasses nol. pros. I know from their actual practice they draw a distinction between these two bases of proceeding.

184 Mr. Fleming: The only distinction I know between a filing of a nol. and dismissal in open court is the defendant is there on a dismissal and he is not on a nolle.

I direct you then to the part of my original brief which discusses Rule 58.

The Court: I know you do, but there is one thing that bothers me there.

Mr. Fleming: If you have the rule, I will show you the advisory note which follows it.

Mr. Kasanof: And the case cited by the Advisory Committee very plainly says it was meant to leave the judicial discretion with the government until trial commences.

Mr. Fleming: The cases in my brief say a dismissal under Rule 48 is no more than a common law nolle.

Mr. Rogge: I question the identification of the two, Rule 48 to the contrary notwithstanding, because I know as a matter of practice there are times when you do one and there are times when you do the other.

Mr. Fleming: We do one when the defendant is not there, and we do the other when he is.

185 Mr. Rogge: So there is a difference.

The Court: Let's go further, and this goes to the practical underlying things, which is another one of the agonizing aspects, albeit somewhat peripheral of this problem. To be perfectly candid, we all know that when dismissal motion was made and the government consented nobody, but nobody, had any doubts or reservation but that this was final.

Mr. Fleming: No, Judge. I don't think that is ever true. Look, certainly we are good faith people, we are not going to drag Rocco out of prison and prosecute him on the kidnapping count.

Mr. Kasanof: Could you had you wanted him to, that is the question.

Mr. Fleming: I think we could.

Mr. Kasanof: Do you think the Court in this District would have permitted you to do that?

Mr. Fleming: I am talking under the law, without question we could, and that is why I take the position I do.

Mr. Kasanof: I think I can give you an answer. The Solicitor General confessed where, due to a calendar practice, the government took a plea under one count and not only didn't nolle, did nothing as to the other counts
186 and it was restored to the calendar. There was a conviction. It was affirmed in the Circuit and the Solicitor General suggested to the Court that the Supreme Court vacate it.

Mr. Fleming: And I think that proves the point. As a matter of policy he suggested it be vacated. My position is based on a matter of law, and as a matter of law we could proceed.

The Court: I hate to do this, because I know how busy you are on this, let alone other matters, but I am really troubled by this. Aside and apart from the main stream of the double jeopardy argument, I just am troubled by the concept that seven years later a count can be heated up like this. I realize there is no—at least at first blush there is no statute of limitations problem. Obviously, for reasons which you have made clear before, and I know that. But just as a matter of essential fairness—

Mr. Fleming: Judge, it seems to me that you are looking at this the wrong way.

The Court: I may be. I have confessed that.

Mr. Rogge: I would certainly hope you have our view.

The Court: I confess that. I don't know. I am
187 just trying to tell you frankly what is bothering me here.

Mr. Fleming: Let me say this. I am not heating this up because I want to, I am heating this up because Rocco Tateo wants a new trial.

Mr. Kasanof: You misunderstood Rocco Tateo.

Mr. Rogge: Yes.

Mr. Fleming: I think when you approach it that way you can't really call it heating up.

Mr. Kasanof: Why didn't the government restore the old count? The government—your Honor, this isn't pro-

bative of anything, but I think it ree forces your Honor's feeling about this. The government itself must have had some kind of queeziness. They just didn't put the indictment back on the calendar and say, Well, the prior dismisal is now unglued, we are ready to go ahead on the old indictment. For some reason or other they felt strongly enough about it to put this matter in front of a grand jury again.

Mr. Fleming: That isn't so. The old count was dismissed. Perhaps we could have, but I wasn't going to do the research to prove it could have been reinstated when I could go to a grand jury.

188 The Court: I don't blame you. First, I am not charging you with dereliction of duty. That is the last thing I was charging you with.

Mr. Fleminng: That was never in my mind.

The Court: Speaking in the vernacular, all I am trying to do is speak in somewhat, I think, terms as to what bothers me. Obviously, I would have done the same thing you did here. I would probably have gone roaring in and gotten a new indictment. I am pretty sure I would have. But that doesn't answer the problem. What I am groping for is this: I have a feeling that aside and apart from double jeopardy principally, strictly there may be another area of doubt here, namely, under these peculiar facts, can the old kidnapping count dismissed with the consent of the United States, be revived even though there is no statute of limitations problem?

Mr. Fleming: If there had been a nolle filed rather than a dismissal, would you have the same problem?

The Court: Probably not, although I am not sure I am right in making that distinction.

Mr. Fleming: I suggest if you wouldn't have the same problem if a nolle were filed, if you again look at the part of my brief that refers to Rule 48 and some of the

189 cases which discuss the identity of a nolle and a dismissal under Rule 48, then the problem disappears.

The Court: I haven't done that. I have read your brief but not the cases there.

All right, gentlemen, I don't really see any useful purpose in keeping you any longer.

I thank you.

Mr. Kasanof: I have something in the way of housekeeping. I would appreciate, your Honor,—I am afraid I may be pressed in the State Court—if your Honor intends to proceed on it, I would be placed, if you would place me, under a direction as the the 6th now, so I can protect myself against embarrassment in the State Court.

The Court: You and all counsel, prosecution and defense, are directed that we will start at 10:30 on the morning of May 6, 1963.

Now, anything else?

Mr. Fleming: I have one thing, Judge. I think it should be discussed prior to trial. I don't know whether you want to do it now or some time next week, but it is the question of—

The Court: Do you want this on the record or off?

190 Mr. Fleming: I think so, yes, sir.

The Court: Which?

Mr. Fleming: On the record. It is the question of the prior trial, and just how that is to be handled at this one. I don't know if it is a significant problem, but I have never had any retrial before, but I have observed them and I know there are all sorts of dodges to avoid mention of them. I don't know what Mr. Rogge's position is, or Mr. Kasanof's, or your Honor's.

The Court: I would suggest to you that the frontal way is the best, but I defer to perhaps more experienced people on both sides of the table here. I have found that if it is explained very simply, that for strictly technical and legal reasons there is a new trial—

Mr. Kasanof: In this case, your Honor, it seems to me that any rational jury seeing a seven year space will come to one of two conclusions, the defendant was a fugitive or in jail, both of them fatal to defendant's right to a fair trial.

The Court: Then what happens—you see, under the best of circumstances, I have seen Mr. Stillman and Mr. Fleming operate, and if they were to say to us right now, "Listen, we will do our level best to keep out any reference

191 of the trial," I would believe them, but even there under the best of intentions and efforts you know what happens sometimes.

Mr. Kasanof: No question.

Mr. Rogge: You have a real problem here. I am not prepared to give an answer on it at this point. I, too, would take the word of the prosecution, but I also can say to your Honor that despite that I would be almost sure that somewhere along the trial it is impossible—this is another one of the difficulties here—somewhere along the line some question or some witness or some answer is going to bring this up.

At the moment, I don't know how you are going to handle it.

Mr. Fleming: I can say this, Judge. That I intend to offer admissions on the voir dire before Judge Weinfeld and the admissions made the other day, whatever implication is there.

The Court: If that is all you are going to do, I think I can handle it. But offers in the direct sense do not disturb me. What disturbs me is what I tried to articulate and what Mr. Rogge did articulate. That is the real problem.

Offers of proof, I know that U. S. Attorney will make
192 in the proper manner, and we can handle the offers.

I would suggest this, there probably is no simple answer. Perhaps you are right. A frontal approach in a capital case, if this is one, or even if it isn't, is a serious enough case, maybe that isn't good.

Mr. Rogge: Let me give you a specific illustration. You have a witness on the stand and there is a conflict with prior testimony. In the Witner case, Judge Palmieri directed counsel to refer to a prior proceeding.

Mr. Stillman: First, I don't know if it helps, in the second place you are pretty close to trial. I don't know how you are going to meet this.

The Court: In my experience as a judge, much as we all know, in a civil case there was a prior case the testimony was used, and it was referred to as a prior proceeding, although we didn't have any great problem, obviously, in a civil case, and curiously enough a number of the jurors I am told by counsel for both sides really weren't sure what that meant. But that is just perhaps a coincidence, I don't know.

Well, there is no answer can be given you now. I think I will think about it.

193 Mr. Fleming: I have one other thing, if I may. If this is a capital case, if that is the way it ends up,

on the voir dire I imagine that the jurors will be questioned about their feelings on capital punishment, and my question goes to a challenge for cause. If a juror is in favor of it or against it, how does that leave us?

Mr. Rogge: It is a challenge for cause.

The Court: What you are saying is how will I rule.

Mr. Rogge: We would submit it is a challenge for cause.

Mr. Kasanof: If it come about that the new jeopardy indictment goes to trial, I take it the government is going to ask for a death penalty?

Mr. Fleming: No, I am not going to take a position. Maybe you weren't here—

Mr. Rogge: It is trial by jury, according to Mr. Fleming.

The Court: I will try to coerce the U. S. Attorney right now. Are you sure you are going to do that?

Mr. Fleming: Not do anything.

The Court: I ask you to think about this. You
194 may be right. But I wonder if that is the position as a matter of law that the prosecution has to take. Remember you and I discussed this, and you pointed out perfectly properly, that it could well be reasoned under the statute that it makes no difference what the United States Attorney says, it is there, and there it is, it is the jury's determination as a matter of law. But I wonder.

Mr. Kasanof: I think you will find—at least not really this point, but the courtmartial practice, death if a courtmartial so directs where the convening authority may, by failing to request, a capital case can stipulate it as a non-capital case.

The Court: It is none of my business, but I would just like to ask you to think about that downstairs because there are a number of ramifications pro and con that flow from this, and of course as I understand it, I think you told me, in the previous trial Arthur Christie got up and said point blank, as the chief prosecutor, that the government was not going to ask the jury, under this subdivision of the statute, to recommend a capital penalty.

Mr. Kasanof: That is another Green case.

The Court: Thank you very much.

(Reporter's certificate to foregoing transcript omitted in printing).

(File endorsement omitted)

195 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Ruling Denying Motion for Reargument—May 8, 1963

Before: HON. HAROLD R. TYLER, JR., District Judge.

The Court: Well, gentlemen, I am going to deny the motion for reargument and I will endorse the papers on the back of your notice of motion, Mr. Fleming, to that effect.

I am also going to sign the order substantially as admitted by Messrs. Rogge and Kasanof, dismissing indictment C 149-341 and 63 Cr 299 as against defendant Rocco Tateo, and further ordering, of course, pursuant to the statute, that he is to be admitted or to be released on his own recognizance. That is pursuant to 18 U.S.C. 3731.

Now, Mr. Fleming, I will hand this back down to you. There is a space for you to approve as to form only. It may be a meaningless gesture, but I have made one change in there, in the first page, gentlemen.

There is the word "reargument." I feel that the
196 more accurate is "further argument" under the circumstances. You will remember, we did not really reargue. We had a further argument.

Mr. Rogge: In other words, your Honor struck out the word "reargument" and inserted the words "further argument."

The Court: Exactly.

Mr. Fleming: If your Honor pleases, as I understand, my signatures is not necessary on the settlement order, nor is Mr. Morgenthau's.

The Court: That is correct, but I just pass it down to you and if you feel, for reasons of your own, that you would rather not have your name on it, I would be more than sympathetic and understanding.

Mr. Fleming: Just as a fetich, your Honor, I would rather not.

The Court: I understand.

Mr. Fleming: If I may, your Honor, although, as your Honor knows, I disagree with the Court's opinion, I respect it for the courage with which it is rendered, and I want to thank your Honor for the opportunity to reargue here today.

The Court: Well, it is none of my business, to be sure, but I would assume, indeed, I would expect that an appeal might be taken here.

I think that this is an important precedent, if not a difficult one. Even though I feel that I am right, I could very well be wrong.

All right, gentlemen, I have signed the order and I will give it to the clerk, and he will file it.

(Reporter's certificate to foregoing transcript omitted in printing).

(File endorsement omitted)

198 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C 149-341 63 Cr. 299

UNITED STATES OF AMERICA,

—against—

ROCCO TATEO, *Defendant.*

Opinion—May 3, 1963

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York,

PETER E. FLEMING, JR. and
CHARLES A. STILLMAN, Assistant United States Attorneys, of Counsel.

O. JOHN ROGGE, ESQ. and
ROBERT KASANOF, ESQ., of New York, N. Y., Attorneys for Defendant.

TYLER, D. J.

Rocco Tateo, who is presently scheduled to go to trial on May 6, 1963 upon the above two indictments charging offenses arising under the federal bank robbery statute, has made several motions to dismiss these indictments. His principal motion, which will be treated in this opinion, presents a serious question relating to the meaning
199 and application of the provision of the Fifth Amendment to the Constitution declaring that no person shall ". . . be subject for the same offense to be twice put in jeopardy of life or limb . . .".

To put the double jeopardy questions here presented in proper perspective, it is necessary to summarize the previous history of this case.

On March 2, 1956, the County Trust Company branch bank in Port Chester, New York, was robbed of approximately $188,000. Thereafter, on March 30, 1956, a grand jury sitting in this district indicted three individuals, Arthur Paisner, Angelo John and Rocco Tateo, for various offenses arising out of this robbery. The indictment,

No. C 149-341, contained five counts which charged bank robbery by force and violence (18 U.S.C. 2113(a)); taking and carrying away with intent to steal (18 U.S.C. 2113(b)); receiving and possessing the proceeds of the bank bank robbery (18 U.S.C. 2113(c)); kidnapping in connection with the robbery (18 U.S.C. 2113(e)); and a conspiracy to commit the substantive offenses (18 U.S.C. 371).

200 Prior to trial of this first indictment, No. C 149-341, defendant Arthur Paisner pleaded guilty to all counts except the kidnapping count. On May 15, 1956, the trial commenced under this indictment as to the two remaining defendants before a judge of this court and a jury. After four days of trial, during which a jury was selected and impanelled and testimony was taken, defendant Tateo withdrew his plea of not guilty and on May 21, 1956 pleaded guilty to all counts with the exception of the kidnapping count. The following day, May 22, 1956, defendant Angelo John did likewise; on the same day the jury was discharged.

On June 5, 1956, all defendants were sentenced by the trial judge, who imposed a total sentence upon Tateo of 22 years and 6 months as follows: robbery by force and violence—20 years; taking and carrying away with intent to steal—10 years; receiving and possession—10 years; and conspiracy—2 and ½ years. The three substantive count sentences were to run concurrently with each other, and the sentence for conspiracy was to run consecutively thereafter.

201 As soon as this sentence had been imposed on June 5, 1956, and in accordance with ordinary routine followed in this district, Tateo's counsel moved to dismiss the kidnapping count. Upon consent of the prosecution, this motion was granted. Tateo was immediately remanded.

He remained in prison, serving the imposed sentence, until shortly after February 8 of this year, on which date another judge of this court granted Tateo's motion pursuant to 28 U.S.C. 2255 to vacate and set aside the judgment of conviction on the ground that Tateo's plea of guilty, entered on May 21, 1956, had been "coerced" by a statement or statements of the trial judge. *United States* v.

(File endorsement omitted)

198 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963).[1] On March 28, 1963, some weeks after that order had been entered, another grand jury sitting in this district returned an in-
202 dictment, No. 63 Cr. 299, of one count against Rocco Tateo. This count is substantially the same as the original kidnapping count.

The government's position, in its papers in opposition to the defendant Tateo's present motion, is that the February 8, 1963 order automatically re-instated the four counts of indictment No. C 149-341 to which Tateo pleaded guilty, but may not have re-instated the kidnapping count, since that count had been dismissed on June 5, 1956 upon Tateo's motion and with consent of the government. Further, it is the government's theory that since the kidnapping subsection (Section 2113(e)) of the federal bank robbery statute provides a penalty of death upon recommendation of the jury after conviction, this is thus a capital charge and not barred by statute of limitations.

At the first hearing and argument of this motion by defendant, both his papers and those of the government focused entirely upon the double jeopardy question inherent in the "revival" of the kidnapping count. As the argument developed, this court informed all counsel that in its view a substantial double jeopardy question
203 might also be presented respecting those counts to which Tateo pleaded guilty on May 21, 1956 after some four days of trial before a jury. Accordingly, further briefs were submitted and a re-argument was had on April 26, 1963 on all aspects of the double jeopardy problem presented by this case. Essentially, this problem breaks down into two questions:[2]

1. Will a trial of Tateo upon Indictment No. 63 Cr. 299 work an unconstitutional second jeopardy for the crime

[1] Although the order setting aside the judgment of conviction is expressly responsive to Tateo's "motion to vacate and . . . for a new trial", 214 F. Supp., at p. 568; *cf.*, 28 U.S.C. 2255, the record makes clear that the court did not have before it, and did not intend to pass upon, the merits of the issue decided herein.

[2] Defense counsel also urge that re-trial of Counts 2 and 4 of No. C 149-341 is barred by the circumstance that Tateo has completed the mandatory portions of the concurrent ten year sentences imposed on these counts on May 21, 1956. *United States* v. *Bayless*, 147 F.2d 171 (8th Cir. 1945). I do not reach this issue.

charged in Count 3 (the kidnapping count) of Indictment No. C 149-341, which was dismissed on June 5, 1956?

2. Will a new trial of Tateo upon Counts 1, 2, 4 and 5 of No. C 149-341, to which Tateo made his coerced plea of guilty, work an unconstitutional second jeopardy?

204 This court is constrained to hold that both questions must be answered in the affirmative.

This case is crucially different from the usual instance in which a conviction is set aside under 28 U.S.C. 2255 and a new trial is not barred by the principle of double jeopardy. The critical distinguishing factor is that Tateo's trial commenced but was not completed.

The principle of double jeopardy made controlling by this fact is the re-trial after the termination-before-verdict of a prior trial is barred unless the termination was either consented to or based upon "exceptional circumstances". Since neither constitutionally sound consent nor an "exceptional circumstance" underpinned the termination here, a second trial is constitutionally impermissible.

Federal courts, in seeking to safeguard a defendant's "valued right to have his trial completed by the particular tribunal summond to sit in judgment on him", *Downum* v. *United States*, ... U.S. ..., decided April 22, 205 1963, 31 Law Week 4369, at p. 4370, have been guided by the strictures of Mr. Justice Story who, in writing for a unanimous Supreme Court in 1824, said:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public has for the

faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." (*United States* v. *Perez*, 9 Wheat. 579, at p. 580 (1824)).

According to the record, the trial judge made his statements, which have been found to have had a coercive effect upon Tateo, on Friday, May 18, 1956. On the
206 following Monday Tateo entered his plea of guilty. The jury was discharged the next day, Tuesday, May 22.

Realistically, Tateo's consent to termination cannot be separated from his decision to plead guilty. The sole decision which Tateo faced was whether to finish the trial in the hope of a jury acquittal, or to plead guilty at once. Since it has been judicially determined that Tateo's plea of guilty was coerced by statements of the trial judge, it follows that he was coerced from availing himself of his Fifth Amendment right to go to the original jury for its verdict of guilt or innocence. Nor can the dismissal of the original kidnapping count, insofar as it depended upon the decision or "consent" of Tateo, be deemed anything but an incident of this same coerced plea of guilty.

With regard to the "exceptional circumstances" principle, it is sufficient that acceptance of the coerced guilty plea, and, in a sense, the very inducement of it as well, constituted error, whether termed error of fact, of law,
or of both. Hence this cannot in reason be the basis
207 for that "imperious necessity", *Downum* v. *United States, supra*, 31 Law Week, at p. 4370, which must be present to justify the termination.

Finally, the government especially argues that Tateo "waived" his right to be secure from double jeopardy by successfully attacking his conviction. But in *United States* v. *Green*, 355 U.S. 184, 192 (1957), the Supreme Court endorsed the view expressed by Justice Holmes, dissenting in *Kepner* v. *United States*, 195 U.S. 100, 135 (1904), that where double jeopardy is at issue, "It cannot matter that the prisoner procures the second trial."

For, as Justice Holmes went on to state in the passage quoted by the court in *Green*: "...[I]t cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so impor-

tant as to be saved by an express clause in the Constitution of the United States." 195 U.S. at p. 135.[3]

208 The Supreme Court has stated, in *Downum* v. *United States, supra*, 31 Law Week at page 4370:

> "Harrassment of an accused by successive prosecutions or declaration of a mis-trial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States, supra*, p. 369. But those extreme cases do not mark the limits of the guarantee."

The recent decision in *Downum* makes clear that individual applications of the rule of double jeopardy do not hinge upon a finding of prejudice to the defendant beyond that prejudice which inheres in foreclosing him foreover from the chance to be acquitted by the tribunal before whom he is first placed in jeopardy. *United States* v. *Perez*, 9 Wheat. 579 (1824). The result here reached is thus compelled completely without regard either for the possible guilt of Tateo or for the unquestionably high purpose which prompted the trial judge to act as he did on May 18 and 21, 1956.[4]

209 Accordingly, it is determined that Indictments No. C 149-341 and No. 63 Cr. 299 must be dismissed as against Rocco Tateo.

Settle order in accordance with the foregoing for submission to this court for signature at 10:00 a.m. on May 8, 1963.

Dated: New York, N. Y.
May 3, 1963.

/s/ H. R. Tyler, Jr.
U.S.D.J.

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[3] Just as the defendant in *Green* was held not to have waived his right to be secure from re-trial after there had been an acquittal, so I hold here that Tateo has not waived his right to be secure from re-trial after there has been an improper termination.

[4] And, similarly, without regard for the fact that the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution. *Fong Foo et al* v. *United States*, 369 U.S. 141 (1962); *Gori* v. *United States*, 367 U.S. 364, at p. 373 (1961) (dissenting opinion by Douglas, J.).

(File endorsement omitted)

211 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Order Dismissing Indictments—May 8, 1963

The defendant Rocco Tateo, having moved this court for an order dismissing Indictments C 149-341 and 63 Cr. 299, on the grounds that trial of those indictments is barred by the prohibition against double jeopardy of the Fifth Amendment of the Constitution of the United States, and said motion having come on to be heard on April 16, 1963, the Court having heard O. John Rogge, Esq., in support of said motion, and Robert Morgenthau, United States Attorney for the Southern District of New York by Peter E. Fleming, Jr., and Charles A. Stillman, Assistant United States Attorneys in opposition to said motion, and further argument of said motion having been had on April 26, 1963, the Court having heard O. John Rogge, Esq., and Robert Kasanof, Esq., attorneys for the defendant Tateo in support of said motion, and Robert Morgenthau, United States Attorney for the Southern District by Peter E. Fleming, Jr., and Charles A. Stillman, Assistant United States Attorneys, in opposition to said motion,

Now Therefore, on the motion of O. John Rogge, Esq., and Robert Kasanof, Esq., attorneys for the defendant Tateo, and after hearing the parties and due deliberation having been given, and the Court having
212 rendered its decision, and filed its opinion on May 3, 1963, and on the arguments briefs and memoranda, and on the official files of this Court in Indictments C 149-341 and 63 Cr. 299, and on all the proceedings heretofore had herein, it is hereby:

Ordered, that Indictments C 149-341 and 63 Cr. 299 be and they are both hereby dismissed as against Rocco Tateo on the ground that their trial would subject him to being twice put in jeopardy in violation of the Fifth Amendment, and it is further

ORDERED, that pursuant to 18 U.S.C. § 3731 the defendant Rocco Tateo shall be discharged forthwith and admitted to bail on his own recognizance, subject to the further orders of this Court.

Dated: New York, New York
May 8, 1963

H. R. TYLER, JR.
U. S. D. J.

(File endorsement omitted)

213

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title omitted)

Notice of Appeal to the Supreme Court of the United States—Filed June 6, 1963

I. Notice is hereby given that the United States of America appeals to the Supreme Court of the United States from the order of Honorable Harold R. Tyler, Jr., United States District Judge, entered in the Southern District of New York on May 8, 1963 sustaining a plea in bar, and dismissing the captioned indictment, which charged the defendant with violations of Section 2113, Title 18, United States Code (bank robbery).

This appeal is taken pursuant to Title 18, United States Code, Section 3731.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and will please include in said transcript the following:

(1) Indictment C.149-341, filed on March 30, 1956.

(2) Minutes of the plea of guilty entered by the defendant ROCCO TATEO to Indictment C.149-341 on May 21, 1956.

(3) Judgment of conviction entered as to said ROCCO TATEO in Indictment C. 149-341 on June 5, 1956.

(4) Petition of said Rocco Tateo for relief pursuant to Section 2255 of Title 28, United States Code, dated and sworn to March 25, 1960.

214 (5) Notice of motion to vacate the aforementioned judgment of conviction, dated May 29, 1961, and the supporting affidavit of said Rocco Tateo, sworn to May 24, 1961.

(6) Notice of motion for rehearing, dated October 9, 1961, and the supporting affidavit of said Rocco Tateo, sworn to October 5, 1961.

(7) Opinion of the Hon. Edward Weinfeld, United States District Judge, dated February 8, 1963, setting aside the aforementioned judgment of conviction and ordering a new trial.

(8) Notice of motion to dismiss Indictment 63 Cr. 299 on the ground of double jeopardy, dated April 12, 1963.

(9) Minutes of oral argument before Hon. Harold R. Tyler, Jr., United States District Judge, on April 16, April 25, and May 8, 1963.

(10) Opinion of Hon. Harold Harold R. Tyler, Jr., United States District Judge, dated May 3, 1963, dismissing Indictments C. 149-341 and 63 Cr. 299 on the ground of double jeopardy, and directing the settlement of an order to that effect.

(11) Order of Hon. Harold R. Tyler, Jr., United States District Judge, entered May 8, 1963, dismissing both of the aforementioned indictments on the ground of double jeopardy, and releasing the defendant Rocco Tateo on his own recognizance.

III. The following question is presented by this appeal:

Whether the Fifth Amendment prohibition against double jeopardy bars the trial of a criminal defendant on four counts of a five count indictment (C. 149-341) where:

215 (1) The defendant was brought to trial in 1956 on all five counts of that indictment and pleaded guilty to the four counts in question after a jury was sworn and evidence received, but before his case was submitted to the jury;

(2) A judgment of conviction thereafter was entered upon the four counts to which the defendant pleaded guilty; and

(3) The judgment of conviction thereafter was set aside upon petition of the defendant pursuant to Section 2255 of Title 28, United States Code, on the ground that the plea was not wholly voluntary.

Yours etc.,

ROBERT M. MORGENTHAU
United States Attorney for the Southern District of New York
Attorney for the United States of America

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Attorneys for Defendant

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No.

UNITED STATES OF AMERICA, APPELLANT

v.

ROCCO TATEO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court dismissing the indictments (Appendix, *infra*, pp. 11-18) is reported at 216 F. Supp. 850. An earlier district court opinion setting aside the judgment of conviction is reported at 214 F. Supp. 560.

JURISDICTION

On May 8, 1963, the district court dismissed the indictments on the ground that the prosecution was barred by the Fifth Amendment provision as to double jeopardy (App., *infra*, p. 18). A notice of appeal to this Court was filed on June 6, 1963. Title 18, Section 3731, of the United States Code confers jurisdiction upon this Court to review on direct appeal the decision

of a district court dismissing an indictment in response to a plea in bar.

QUESTION PRESENTED

In 1956, appellee was brought to trial under a five-count indictment. During the trial, but before the case was submitted to the jury, he withdrew his plea of not guilty and entered a plea of guilty to four of the counts. A judgment of conviction on these counts was entered and sentence imposed. Subsequently, in collateral proceedings, the judgment was set aside on the ground that the plea of guilty had been influenced by the court's attitude, made known to the appellee, as to the sentence it would impose if he were found guilty.

The question presented is whether the Fifth Amendment bars appellee's retrial upon the four counts of the indictment as to which he had previously pleaded guilty.

STATEMENT

On May 15, 1956, appellee and another were brought to trial before a jury on a five-count indictment charging bank robbery (18 U.S.C. 2113), kidnapping in connection with the robbery (18 U.S.C. 2113(e)) and conspiracy (18 U.S.C. 371). After four days of trial, appellee withdrew his plea of not guilty and pleaded guilty to all counts except that alleging kidnapping. The next day, the co-defendant also changed his plea and at that time the jury was dismissed. Appellee was sentenced to imprisonment for a total of 22 years and 6 months, and, upon imposition of sentence, the kidnapping count was dismissed on his motion, the prosecution consenting.

On February 8, 1963, Judge Weinfeld granted appellee's motion under 28 U.S.C. 2255 to set aside the judgment of conviction and, in the alternative, for a new trial, on the ground that the defendant—

> * * * was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea of guilty.

As shown in the collateral proceedings, the trial court, on Friday, May 18, 1956, had told counsel, during a conference in the robing room, that if the defendants were found guilty, he would impose a life sentence on the kidnapping count and consecutive sentences on the other counts. As a result of the judge's statement, appellee's counsel urged him to plead guilty, pointing out that the government's case was strong and that there was a substantial likelihood of conviction. On the following Monday, appellee entered his plea, which was accepted by the trial judge after inquiry pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

Following Judge Weinfeld's order setting aside the conviction and granting appellee's alternative prayer for a new trial, a grand jury returned a new kidnapping indictment substantially the same as that previously dismissed.

Prior to the second trial, Judge Tyler sustained defense motions to dismiss both the kidnapping indictment and the counts to which appellee had previously pleaded guilty. This appeal is from the order of Judge Tyler dismissing the original indictment in relation

to which the guilty plea had been entered. No appeal has been taken from the order relating to the kidnapping indictment. Judge Tyler reasoned that the action of the trial judge in coercing the plea resulted in an improper dismissal of the jury before verdict and that therefore retrial was barred by the double jeopardy prohibition of the Fifth Amendment.

THE QUESTIONS ARE SUBSTANTIAL

1. Ever since *United States* v. *Ball*, 163 U.S. 662, 672, it has been settled that "a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment * * * for the same offense of which he had been convicted." See *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462; *Bryan* v. *United States*, 338 U.S. 552, 560; *Green* v. *United States*, 355 U.S. 184, 189; *Forman* v. *United States*, 361 U.S. 416, 425. As recently as *Forman*, *supra*, this Court described the doctrine as "elementary in our law."

Here, appellee moved to vacate a judgment of conviction on the ground that his guilty plea had been coerced. Judge Weinfeld, finding that coercion was present, set aside the conviction and granted the request for a new trial. To hold that the Fifth Amendment bars a new trial—after the conviction has thus been set aside on the defendant's initiative—violates the "elementary" rule of the *Ball* case. The fact that the judgment was set aside on motion under 28 U.S.C. 2255, rather than on an appeal, is not significant. In either situation, the case must be retried before a jury other than the one which was first impanelled. Under

the controlling decisions, the rule has been that when a defendant procures the setting aside of a judgment, he subjects himself to a retrial of the charge embraced in that judgment.

Judge Tyler was of the view that *Green* v. *United States*, 355 U.S. 184, had implicitly overruled the theory of waiver on which *Ball* rested. To the extent that *Green* holds that an appeal from a conviction of a lesser degree of an offense does not "waive" an acquittal of the greater degree, this may be so.[1] But *Green* did not affect the basic principle that the setting aside of a judgment makes the defendant once again subject to the jeopardy represented by the judgment.

The "mistrial" situations to which Judge Tyler referred are inapposite. In cases like *Downum* v. *United States*, 372 U.S. 734, there is no judgment of any kind, and, save for the defense of former jeopardy, the government would be free to return another day to prosecute under more favorable conditions. No such considerations are present in the case at bar. So long as the prior judgment of conviction remained in force, it would have constituted an absolute bar to retrial. However serious the error of the trial judge, he certainly did not declare a mistrial or terminate the proceedings and thereby present the government with a second opportunity to convict. On the contrary, the proceedings resulted in a judgment of conviction which

[1] In *Green*, the defendant was charged with first degree murder and found guilty of the lesser included offense of second degree murder. His conviction was reversed on appeal. Upon retrial, he was convicted of first degree murder. This conviction was in turn reversed on the ground of double jeopardy.

was conclusive on all parties until the appellee successfully moved to set it aside. Hence, this is not a case of a second prosecution following an initial failure to secure a conviction. It is, rather, a case where a judgment has been set aside, at the defendant's instance, because of a serious trial error.

When a trial judge commits reversible error, a new trial may be, and ordinarily is, directed by the appellate court. In *Smith* v. *United States,* 161 U.S. 85, 90, where the instructions had the effect of a "command to disregard" the defendant's evidence, this Court concluded, "The judge having, in effect, preemptorily withdrawn this matter from their consideration, the defendant is entitled to a new trial." To the same effect, see *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395. The lower courts have consistently followed the same course. See, *e.g., Konda* v. *United States,* 166 Fed. 91 (C.A. 7); *Cummins* v. *United States,* 232 Fed. 844 (C.A. 8); *Dinger* v. *United States,* 28 F. 24 548 (C.A. 8); *United States* v. *Gollin,* 166 F. 2d 123 (C.A. 3), certiorari denied, 333 U.S. 875; *Schwachter* v. *United States,* 237 F. 2d 640 (C.A. 6); *Edwards* v. *United States,* 286 F. 2d 681 (C.A. 5). This rule applies even if a defendant is serving his sentence when he procures the reversal. *Murphy* v. *Massachusetts,* 177 U.S. 155. And the grant of new trial on reversal of a judgment has been deemed particularly appropriate in instances when the defendant, either in a motion to the district court or on appeal, has requested a new trial. *Bryan* v. *United States,* 338 U.S. 552; *Sapir* v. *United States,* 348 U.S. 373, 374 (concurring

opinion of Mr. Justice Douglas); *Forman* v. *United States,* 361 U.S. 416. See, also, *Irvin* v *Dowd,* 366 U.S. 717, 729, and *Reck* v. *Pate,* 367 U.S. 433, 444, which make clear that a prisoner who successfully resorts to habeas corpus may be retried.[2]

A coerced guilty plea has never been regarded as equivalent to a prior acquittal so as to preclude further prosecution. The normal practice is simply to retry the defendant. See, *e.g., Kercheval* v. *United States,* 274 U.S. 220, where this Court held that the coerced plea was inadmissible in the second prosecution. Thus, there is no bar to retrial of a defendant who obtained release under habeas corpus on the ground of a coerced plea of guilty. *United States* v. *Lowrey,* 77 F. Supp. 301 (W.D. Pa.), affirmed *per curiam,* 172 F. 2d 226 (C.A. 3). See, also, *Cain* v. *United States,* 274 F. 2d 598 (C.A. 5), certiorari denied, 362 U.S. 952, holding that where a defendant moved successfully to withdraw a plea of guilty and for a new trial, he cannot claim former jeopardy at the second trial. A coerced plea has been likened to a conviction supported by a coerced confession. *Waley* v. *Johnston,* 316 U.S. 101, 104. Yet, the admission in evidence of a coerced confession does not bar a second trial. *Bram* v. *United States,* 168 U.S. 532, 569; *Reck* v. *Pate, supra.* Only last Term in such a case, *Fay* v.

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[2] Retrial has also been ordered where a judge is disqualified due to personal involvement (*Offutt* v. *United States,* 348 U.S. 11); where the judge interferes with jury deliberations by coercive inquiries (*Jacobs* v. *United States,* 279 F. 2d 826 (C.A. 8)); or where comments and questions of the judge belittle the defendant and his case (*United States* v. *DeSisto,* 289 F. 2d 833 (C.A. 2)).

Noia, 372 U.S. 391, 397, this Court affirmed an order that the defendant's conviction be set aside "and that he be * * * given a new trial forthwith."

Judge Tyler reasoned that coercion occurring after the jury had been impanelled deprived the defendant of his right to that jury's verdict. But precisely the same result obtains when a judge's instructions improperly invade the province of the jury; yet, there is no question as to the propriety of retrial after such an error.

To the extent that a specific request for a new trial is meaningful in determining appropriate relief, that factor is also present here. Appellee originally requested "the vacation of the judgment and discharge from custody or, in the alternative, to be rearraigned to plead *de novo* to the aforesaid indictments". The latter prayer is precisely what Judge Weinfeld granted.

2. Even if the dismissal of the jury upon acceptance of an involuntary plea of guilty could properly be viewed as a "mistrial", the issue of whether retrial after a mistrial constitutes double jeopardy, this Court has held, turns on the particular facts of each case. *Downum* v. *United States,* 372 U.S. 734, 737. The instant case is not characterized by any of the factors which have hitherto led courts to bar retrial after declaration of a mistrial.

As Judge Tyler recognized, in upholding the defendant's claim, "the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution" (App. *infra,* p. 17). There is no possible room for a contention that the government's case was

going badly; indeed, Judge Weinfeld found that defense counsel was of the opinion "that the Government's case was strong; that there was an excellent chance of conviction" (214 F. Supp. 560, 563). Moreover, a second trial does not involve any element of oppressive harassment or unfairness. Not only would appellee receive what he asked for in the first place; he stands to benefit from any flaws which the passage of time may have created in a formerly strong case. He also has the tactical advantage resulting from the fact that a substantial portion of the government's case has been revealed, while his own case is still unexposed.

If a judge errs in the course of a trial and then concludes that his action or ruling can only be satisfactorily cured by a new trial, certainly he should be encouraged to take steps forthwith, *i.e.*, to declare a mistrial, rather than persist in his error and leave corrective measures to appellate or collateral proceedings. We fail to see why termination of a trial in such circumstances should ever yield a different result from that which would follow from a subsequent reversal on the same ground. Moreover, the prevailing decisions confirm the view that a mistrial resulting from a judge's recognition of his error is not an obstacle to retrial. *Scott* v. *United States*, 202 F. 2d 354 (C.A. D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles*, 19 F. Supp. 1009 (W.D. Okla.); *State* v *Helm*, 66 Nev. 286, certiorari denied, 339 U.S. 942; *People* v. *Thomas*, 15 Ill. 2d 344, certiorari denied, 359 U.S. 1005.[3] No more should the judge's error in this case—

[3] See, also, American Law Institute, Model Penal Code, Tentative Draft No. 5, Sec. 1.09(4).

an error nowise induced by the prosecution and one which also terminated the trial—be deemed a bar.

A contrary approach, we believe, would prejudice the sound administration of the criminal law. A trial judge may well hesitate to terminate a trial, even though he believes that the circumstances warrant this course, if his action may produce the untoward consequence that the public will be thereby permanently deprived of its right to have the underlying charge adjudicated.

CONCLUSION

This case raises substantial questions of public importance which warrant resolution by this Court. It is respectfully submitted that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME NELSON,
Attorneys.

AUGUST 1963.

APPENDIX

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 149-341

63 Cr. 299

UNITED STATES OF AMERICA

against

ROCCO TATEO, DEFENDANT

OPINION

TYLER, *D.J.*

Rocco Tateo, who is presently scheduled to go to trial on May 6, 1963 upon the above two indictments charging offenses arising under the federal bank robbery statute, has made several motions to dismiss these indictments. His principal motion, which will be treated in this opinion, presents a serious question relating to the meaning and application of the provision of the Fifth Amendment to the Constitution declaring that no person shall ". . . be subject for the same offense to be twice put in jeopardy of life and limb. . . ."

To put the double jeopardy questions here presented in proper perspective, it is necessary to summarize the previous history of this case.

On March 2, 1956, the County Trust Company branch bank in Port Chester, New York, was robbed of approximately $188,000. Thereafter, on March 30, 1956, a grand jury sitting in this district indicted three individuals, Arthur Paisner, Angelo John and Rocco Tateo, for various offenses arising out of this robbery. The indictment, No. C 149-341, contained five counts which charged bank robbery by force and violence (18 U.S.C. 2113(a)); taking and carrying away with in-

tent to steal (18 U.S.C. 2113(b)); receiving and possessing the proceeds of the bank robbery (18 U.S.C. 2113(c)); kidnapping in connection with the robbery (18 U.S.C. 2113(e)); and a conspiracy to commit the substantive offenses (18 U.S.C. 371).

Prior to trial of this first indictment, No. C 149-341, defendant Arthur Paisner pleaded guilty to all counts except the kidnapping count. On May 15, 1956, the trial commenced under this indictment as to the two remaining defendants before a judge of this court and a jury. After four days of trial, during which a jury was selected and impanelled and testimony was taken, defendant Tateo withdrew his plea of not guilty and on May 21, 1956 pleaded guilty to all counts, with the exception of the kidnapping count. The following day, May 22, 1956, defendant Angelo John did likewise; on the same day the jury was discharged.

On June 5, 1956, all defendants were sentenced by the trial judge, who imposed a total sentence upon Tateo of 22 years and 6 months as follows: robbery by force and violence—20 years; taking and carrying away with intent to steal—10 years; receiving and possession—10 years; and conspiracy—2 and ½ years. The three substantive count sentences were to run concurrently with each other, and the sentence for conspiracy was to run consecutively thereafter.

As soon as this sentence had been imposed on June 5, 1956, and in accordance with ordinary routine followed in this district, Tateo's counsel moved to dismiss the kidnapping count. Upon consent of the prosecution, this motion was granted. Tateo was immediately remanded.

He remained in prison, serving the imposed sentence, until shortly after February 8 of this year, on which date another judge of this court granted Tateo's motion pursuant to 28 U.S.C. 2255 to vacate and set

aside the judgment of conviction on the ground that Tateo's plea of guilty entered on May 21, 1956, had been "coerced" by a statement or statements of the trial judge. *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963).[1] On March 28, 1963, some weeks after that order had been entered, another grand jury sitting in this district returned an indictment, No. 63 Cr. 299, of one count against Rocco Tateo. This count is substantially the same as the original kidnapping count.

The government's position, in its papers in opposition to the defendant Tateo's present motion, is that the February 8, 1963 order automatically re-instated the four counts of indictment No. C 149-341 to which Tateo pleaded guilty, but may not have re-instated the kidnapping count, since that count has been dismissed on June 5, 1956 upon Tateo's motion and with consent of the government. Further, it is the government's theory that since the kidnapping subsection (Section 2113(c)) of the federal bank robbery statute provides a penalty of death upon recommendation of the jury after conviction, this is thus a capital charge and not barred by statute of limitations.

At the first hearing and argument of this motion by defendant, both his papers and those of the government focused entirely upon the double jeopardy question inherent in the "revival" of the kidnapping count. As the argument developed, this court informed all counsel that in its view a substantial double jeopardy question might also be presented respecting those counts to which Tateo pleaded guilty on May 21, 1956

[1] Although the order setting aside the judgment of conviction is expressly responsive to Tateo's "motion to vacate and . . . for a new trial", 214 F. Supp., at p. 568; *cf.*, 28 U.S.C. 2255, the record makes clear that the court did not have before it, and did not intend to pass upon, the merits of the issue decided herein.

after some four days of trial before a jury. Accordingly, further briefs were submitted and a re-argument was had on April 26, 1963 on all aspects of the double jeopardy problem presented by this case. Essentially, this problem breaks down into two questions.[2]

1. Will a trial of Tateo upon Indictment No. 63 Cr. 299 work an unconstitutional second jeopardy for the crime charged in Count 3 (the kidnapping count) of Indictment No. C 149-341, which was dismissed on June 5, 1956?

2. Will a new trial of Tateo upon Counts 1, 2, 4 and 5 of No. C 149-341, to which Tateo made his coerced plea of guilty, work an unconstitutional second jeopardy?

This court is constrained to hold that both questions must be answered in the affirmative.

This case is crucially different from the usual instance in which a conviction is set-aside under 28 U.S.C. 2255 and a new trial is not barred by the principle of double jeopardy. The critical distinguishing factor is that Tateo's trial commenced but was not completed.

The principle of double jeopardy made controlling by this fact is that re-trial after the termination-before-verdict of a prior trial is barred unless the termination was either consented to or based upon "exceptional circumstances".

Since neither constitutionally sound consent nor an "exceptional circumstance" underpinned the termination here, a second trial is constitutionally impermissible.

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[2] Defense counsel also urge that re-trial of Counts 2 and 4 of No. C 149-341 is barred by the circumstance that Tateo has completed the mandatory portions of the concurrent ten year sentences imposed on these counts on May 21, 1956. *United States* v. *Bayless*, 147 F.2d 171 (8th Cir. 1945). I do not reach this issue.

Federal courts, in seeking to safeguard a defendant's "valued right to have his trial completed by the particular tribunal summoned to sit in judgment on him", *Downum* v. *United States;* — U.S. —, decided April 22, 1963, 31 Law Week 4369, at p. 4370), have been guided by the strictures of Mr. Justice Story who, in writing for a unanimous Supreme Court in 1824, said:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public has for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." (*United States* v. *Perez,* 9 Wheat. 579, at p. 588 (1824)).

According to the record, the trial judge made his statements, which have been found to have had a coercive effect upon Tateo, on Friday, May 18, 1956. On the following Monday Tateo entered his plea of guilty. The jury was discharged the next day, Tuesday, May 22.

Realistically, Tateo's consent to termination cannot be separated from his decision to plead guilty. The sole decision which Tateo faced was whether to finish the trial in the hope of a jury acquittal, or to plead guilty at once. Since it has been judicially determined that Tateo's plea of guilty was coerced by statements of the trial judge, it follows that he was coerced from availing himself of his Fifth Amendment right to go to the original jury for its verdict of guilt or innocence. Nor can the dismissal of the original kidnapping count, insofar as it depended upon the decision or "consent" of Tateo, be deemed anything but an incident of this same coerced plea of guilty.

With regard to the "exceptional circumstances" principle, it is sufficient that acceptance of the coerced guilty plea, and, in a sense, the very inducement of it as well, constituted error, whether termed error of fact, of law, or of both. Hence this cannot in reason be the basis for that "imperious necessity," *Downum* v. *United States, supra,* 31 Law Week, at p. 4370, which must be present to justify the termination.

Finally, the government especially argues that Tateo "waived" his right to be secure from double jeopardy by successfully attacking his conviction. But in *United States* v. *Green,* 355 U.S. 184, 192 (1957), the Supreme Court endorsed the view expressed by Justice Holmes, dissenting in *Kepner* v. *United States,* 195 U.S. 100, 135 (1904), that where double jeopardy is at issue, "It cannot matter that the prisoner procures the second trial."

For, as Justice Holmes went on to state in the passage quoted by the court in *Green*: ". . . [I]t cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express

clause in the Constitution of the United States." 195 U.S. at p. 135.[3]

The Supreme Court has stated, in *Downum* v. *United States, supra,* 31 Law Week at page 4370:

> "Harrassment of an accused by successive prosecutions or declaration of a mis-trial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States, supra,* p. 369. But those extreme cases do not mark the limits of the guarantee."

The recent decision in *Downum* makes clear that individual applications of the rule of double jeopardy do not hinge upon a finding of prejudice to the defendant beyond that prejudice which inheres in foreclosing him forever from the chance to be acquitted by the tribunal before whom he is first placed in jeopardy. *United States* v. *Perez,* 9 Wheat. 579 (1824). The result here reached is thus compelled completely without regard either for the possible guilt of Tateo or for the unquestionably high purpose which prompted the trial judge to act as he did on May 18 and 21, 1956.[4]

Accordingly, it is determined that Indictments No. C 149-341 and No. 63 Cr. 299 must be dismissed as against Rocco Tateo.

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[3] Just as the defendant in *Green* was held not to have waived his right to be secure from re-trial after there had been an acquittal, so I hold here that Tateo has not waived his right to be secure from re-trial after there has been an improper termination.

[4] And, similarly, without regard for the fact that the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution. *Fong Foo et al* v. *United States,* 369 U.S. 141 (1962); *Gori* v. *United States,* 367 U.S. 364, at p. 373 (1961) (dissenting opinion by Douglas, J.).

Settle order in accordance with the foregoing for submission to this court for signature at 10:00 a.m. on May 8, 1963.

Dated: New York, N.Y., May 3, 1963.

H. R. TYLER, JR.
U.S.D.J.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 149-341

63 Cr. 299

UNITED STATES OF AMERICA,

against

ROCCO TATEO, DEFENDANT.

ORDER

The defendant Rocco Tateo, having moved this Court for an order dismissing Indictments C 149-341 and 63 Cr. 299, on the grounds that trial of those indictments is barred by the prohibition against double jeopardy of the Fifth Amendment of the Constitution of the United States, and said motion having come on to be heard on April 16, 1963, the Court having heard O. John Rogge, Esq., in support of said motion, and Robert Morgenthau, United States Attorney for the Southern District of New York by Peter E. Flemming, Jr., and Charles A. Stillman, Assistant United States Attorneys in opposition to said motion, and further argument of said motion having been had on April 26, 1963, the Court having heard O. John Rogge, Esq., and Robert Kasanof, Esq., attorneys for the defendant

Tateo in support of said motion, and Robert Morgenthau, United States Attorney for the Southern District by Peter E. Flemming, Jr., and Charles A. Stillman, Assistant United States Attorneys, in opposition to said motion,

NOW THEREFORE, on the motion of O. John Rogge, Esq., and Robert Kasanof, Esq., attorneys for the defendant Tateo, and after hearing the parties and due deliberation having been given, and the Court having rendered its decision, and filed its opinion on May 3, 1963, and on the arguments, briefs and memoranda, and on the official files of this Court in Indictments C 149-341 and 63 Cr. 299, and on all the proceedings heretofore had herein, it is hereby:

ORDERED, that Indictments C 149-341 and 63 Cr. 299 be and they are both hereby dismissed as against Rocco Tateo on the ground that their trial would subject him to being twice put in jeopardy in violation of the Fifth Amendment, and it is further

ORDERED, that pursuant to 18 U.S.C. § 3731 the defendant Rocco Tateo shall be discharged forthwith and admitted to bail on his own recognizance, subject to the further orders of this Court.

Dated: New York, New York, May 8, 1963.

H. R. TYLER, JR.,
U.S.D.J.

Consented to as to form,

ROBERT MORGENTHAU,
United States Attorney
for the Southern District of New York.

By: PETER E. FLEMMING, JR.,
Assistant United States Attorney
for the Southern District of New York.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963 [illegible]

INDEX

CITATIONS

720-476—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 328

UNITED STATES OF AMERICA, APPELLANT

v.

ROCCO TATEO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court dismissing the indictments (R. 128–133) is reported at 216 F. Supp. 850. An earlier district court opinion setting aside the judgment of conviction (R. 46–57) is reported at 214 F. Supp. 560.

JURISDICTION

On May 8, 1963, the district court dismissed the indictments on the ground that the prosecution was barred by the Fifth Amendment's provision as to double jeopardy (R. 134–135). A notice of appeal to this Court was filed on June 6, 1963 (R. 135–137), and probable jurisdiction was noted on October 21,

1963 (R. 138). The jurisdiction of this Court rests upon 18 U.S.C. 3731.

QUESTION PRESENTED

Appellee was brought to trial in 1956 under a five-count indictment. During trial, but before the case went to the jury, he withdrew his plea of not guilty and entered a plea of guilty to four of the five counts. Subsequently, in collateral proceedings the judgment of conviction was set aside on the ground that the trial judge had coerced the guilty plea. The question presented is whether the Fifth Amendment bars appellee's retrial under the four counts of the indictment to which he had previously pleaded guilty and upon which he had been sentenced.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment provides as follows:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

STATEMENT

On May 15, 1956, Tateo and another were brought to trial before a jury on a five-count indictment charging bank robbery (18 U.S.C. 2113); kidnapping in connection with the robbery (18 U.S.C. 2113(e)); taking and carrying away bank money (18 U.S.C. 2113(b)); receiving and possessing stolen bank money (18 U.S.C. 2113(c)); and conspiracy (18 U.S.C. 371). After four days of trial, on Friday, May 18, 1956, the

trial judge told counsel, during a conference in the robing room, that if the defendants were found guilty, he would impose a life sentence on the kidnapping count and consecutive sentences on the other counts (R. 48). As a result of the judge's statement, appellee's counsel urged him to plead guilty, pointing out that the government's case was strong and that there was a substantial likelihood of conviction. On the following Monday, Tateo entered his plea, which was accepted by the trial judge after inquiry pursuant to Rule 11 of the Federal Rules of Criminal Procedure (R. 6–9). The next day, the co-defendant also changed his plea and at that time the jury was dismissed. Tateo was sentenced to imprisonment for a total of 22 years and 6 months. At the time of imposition of sentence, the prosecution consented to the dismissal of the kidnapping count on Tateo's motion.

On February 8, 1963, Judge Weinfeld granted appellee's motion under 28 U.S.C. 2255 to set aside the judgment of conviction and for a new trial, on the ground that (R. 55):

> With the normal strain under which a defendant labors during a trial, greatly intensified by the cumulative impact of the testimony offered against petitioner by his co-defendant, who had become a Government witness, the Court's advance announcement of the prospective sentence, and, based thereon, the strong urging of his own counsel to plead guilty, it is difficult to believe that the defendant had that capacity for reasoned choice, that freedom of will which is essential to a voluntary plea of guilty.

Tateo was reindicted for the kidnapping offense and brought before Judge Tyler for retrial of this charge and of the four bank robbery charges to which he had previously pleaded guilty. Prior to the second trial, Judge Tyler sustained defense motions to dismiss both the new kidnapping indictment and the four bank robbery counts of the original indictment. As to the latter counts, Judge Tyler held that the action of the trial judge in coercing the guilty plea resulted in an improper dismissal of the jury before verdict and that therefore, under *Downum* v. *United States*, 372 U.S. 734, retrial was barred by the double-jeopardy prohibition of the Fifth Amendment. This appeal is from that decision. No appeal has been taken from the order dismissing the kidnapping indictment.

SUMMARY OF ARGUMENT

1. First announced explicitly in *United States* v. *Ball*, 163 U.S. 662, the rule that a defendant may be retried after he has taken steps to set aside his conviction has been basic to our law for almost seventy years. The rationale of the rule, as generally stated, is that the defendant waives his right not to be retried for a particular offense when he initiates the measures which look to reversal of the conviction. A minority of the Court has at times described the rule in terms of continuation of the original jeopardy until the cause is finally determined after all appeals, collateral attacks, and retrials. Under either statement, appellee is subject to retrial.

Moreover, the fundamental considerations of policy which support the *Ball* rule apply with full force to this case in which the defendant pleaded guilty during trial and subsequently proceeded under 28 U.S.C. 2255 to set the plea aside. First, forbidding retrial after a judgment of conviction has been set aside would grant defendants an immunity simply because of trial error, in derogation of the important interests which are at stake in a trial for crime. The history of the "double jeopardy" clause makes plain that this was never intended. The second and equally important justification for the *Ball* rule is that it allows reviewing courts to pass upon the fairness of a conviction uninfluenced by the issue of the defendant's guilt or innocence—a consideration which would invariably intrude upon the court's decision if reversal barred a subsequent retrial. The first of these reasons plainly applies to a judicial error which invalidates a plea just as much as to one infecting a jury verdict; the second applies with unusual force to review of the propriety of a guilty plea where coercion is rarely obvious and guilt often is.

This Court's decision in *Downum* v. *United States*, 372 U.S. 734, does not cast doubt upon the *Ball* rule or its applicability to this case. Thus, one of the principal justifications for the *Ball* rule—to permit judicial consideration of the impact of trial error without reference to the guilt or innocence of the defendant—has no application in a mistrial case, such as *Downum*,

where the mistrial has been ordered for the convenience of the prosecutor or trial court and not to protect the defendant from the effects of the trial error. Where, in contrast, a mistrial has been ordered to protect the defendant, this Court has allowed retrial—even in contexts where the traditional doctrine of "waiver" cannot be applied—for reasons analogous to those supporting the *Ball* rule, *i.e.*, to secure the trial court's freedom of action in assuring a fair trial. *Gori* v. *United States*, 367 U.S. 364.

2. Even if the present case were treated as if Tateo had moved for a mistrial, instead of pleading guilty, retrial would be authorized. To bar retrial here would be to grant immunity as a consequence of an action of the defendant which, although invalid as a guilty plea, was no less voluntary than the ordinary defense motion for a mistrial and which, upon the setting aside of the conviction, has proved to be much to the defendant's advantage (having resulted in the termination of a trial which his counsel regarded as very likely to result in conviction). Thus, although we submit that this case is properly subject to the *Ball* rule and should not be analogized to a mistrial, there is no bar to a retrial whether the Court views the case as the ordinary one of the *Ball* type, in which a post-conviction remedy has been invoked by the defendant, or treats it as analogous to the mistrial cases because the defendant was induced to forego obtaining the verdict of the original jury.

ARGUMENT

I

THE HOLDING OF *United States* v. *Ball*, 163 U.S. 662, AUTHORIZES RETRIAL OF A DEFENDANT WHOSE JUDGMENT OF CONVICTION, ENTERED ON A GUILTY PLEA MADE DURING TRIAL, HAS BEEN SET ASIDE ON COLLATERAL ATTACK

Appellant was under a judgment of conviction which had disposed of the four charges against him when he moved under 28 U.S.C. 2255 to set aside the sentence imposed on the plea of guilty he made during trial. Finding that the plea was coerced, Judge Weinfeld set aside the conviction and ordered a new trial. The court below has now held (per Tyler J.) that a new trial is barred by the "double jeopardy" clause of the Fifth Amendment, reasoning that a coerced plea entered during trial is the legal equivalent of an improper declaration of mistrial. Reduced to essentials, the holding is that even though the case had gone to final judgment, and even though defendant had the judgment set aside, double jeopardy barred retrial. This holding is contrary to a rule followed by this Court for almost seventy years: that double jeopardy does not bar retrial of a defendant who has procured the setting aside of a judgment of conviction.

A. THERE IS NO DOUBLE JEOPARDY WHEN A DEFENDANT IS RETRIED ON CHARGES EMBODIED IN A JUDGMENT WHICH IS SET ASIDE ON HIS MOTION

1. The principle that the Fifth Amendment does not preclude retrial following the reversal of a convic-

tion was first announced by this Court in 1896 in *United States* v. *Ball*, 163 U.S. 662, although the same rule may be found in the original congressional debate on the amendment[1] and in many federal decisions prior to *Ball*.[2] This rule was described as "elementary in our law" as recently as *Forman* v. *United States*, 361 U.S. 416, 425, and has been applied on numerous occasions in this Court.

In *Ball* itself an earlier conviction had been reversed on writ of error because of a defective indictment, and the case was remanded for "* * * such further proceedings in relation to the defendants as to justice may appertain" (*Ball* v. *United States*, 140 U.S. 118, 136). The defendants were reindicted and convicted, despite their plea of former jeopardy. In holding that the plea was properly overruled, this Court stated (163 U.S. at 671–672):

> Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. * * * it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment,

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[1] 1 Annals of Congress 753.

[2] The propriety of retrial was recognized by several of the lower federal courts and was earlier intimated by this Court in *Ex Parte Lange*, 18 Wall. 163, 173–174. As to the history of the rule allowing retrial following reversal on appeal, see generally *Green* v. *United States*, 355 U.S. 184, 189 (opinion of the Court) and 201–204 (dissenting opinion). See also Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 3–8.

or upon another indictment, for the same offence of which he had been convicted.

In subsequent cases, this Court has held that a defendant may be resentenced following the setting aside of an original illegal sentence (*Murphy* v. *Massachusetts*, 177 U.S. 155); that he may be retried after his first conviction is reversed on a confession of error (*Stroud* v. *United States*, 251 U.S. 15);[3] that he may be retried after his first conviction is reversed on the ground of insufficient evidence (*Bryan* v. *United States*, 338 U.S. 552); and that he may be retried after the original conviction is reversed for error in instructions to the jury (*Forman* v. *United States*, *supra*). In each of the cited cases, as in the case at bar, there was an original conviction or judgment which had been set aside in proceedings initiated by the defendant. Each defendant later contended that because of double jeopardy he could not be retried or resentenced. And in each instance this claim was rejected under the holding of *Ball* that a defendant who has his conviction set aside may be retried.[4]

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[3] The basis for the *Stroud* confession does not appear in the document filed by the Solicitor General with this Court. See No. 694, O. T. 1917 (papers). However, the government's brief in the cited case explained that error had been confessed "for the sole reason that the trial court had refused to receive, on behalf of the defendant, the testimony of convicted felons * * *." (Brief on behalf of the United States, p. 2, *Stroud*, *supra*, No. 276, O. T. 1919).

[4] The decision in *Green* v. *United States*, 355 U.S. 184, did not alter the long-standing rule that one who is successful on appeal may be retried for the *same* offense of which he had been convicted. In *Green* the defendant had been tried for first-degree murder, convicted of second-degree murder, and

It has never been questioned that this rule applies when the defendant's judgment is set aside on collateral attack as well as when it is reversed on appeal. See *Robinson* v. *United States*, 144 F. 2d 392 (C.A. 6), affirmed, 324 U.S. 282; *King* v. *United States*, 98 F. 2d 291 (C.A.D.C.); *Bryant* v. *United States*, 214 Fed. 51 (C.A. 8). Indeed, this conclusion seems indisputable. Both 28 U.S.C. 2255 and 28 U.S.C. 2106 (relating to the power of the appellate courts on direct appeal) include the power to grant new trials. There is obviously no reason why a defendant who proceeds under Section 2255 should receive any greater measure of relief than an accused who proceeds through normal appellate channels.

The rationale of the rule, as this Court has generally stated it, is that a defendant impliedly waives his right not to be retried for a particular offense whenever he seeks to have his conviction of that offense set aside. See, *e.g.*, *Trono* v. *United States*, 199 U.S. 521, 533; *Bryan* v. *United States*, 338 U.S. 552, 560. An alternative statement, early espoused by Justice Holmes but never adopted by a majority of the Court, is that the original jeopardy continues until the cause is finally determined—after all appeals, collateral attacks, and retrials are concluded—by a

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after a successful appeal was retried and convicted of first-degree murder. Noting that in appealing his conviction for second-degree murder, Green did not "waive" what was, in practical effect, his acquittal of first-degree murder, the Court held that retrial for the greater offense was barred by the double-jeopardy clause. The Court carefully pointed out that the decision did not involve the familiar right to retry an appellant for the same offense as was embodied in the judgment of conviction. 355 U.S. at 189–190.

definitive judgment of conviction or acquittal. See *Kepner* v. *United States,* 195 U.S. 100, 134–137 (dissenting opinion), and *Green* v. *United States, supra,* at 219 (dissenting opinion).[5] Neither formulation of the underlying principle can be squared with the result reached in the instant case, where the defendant, in a collateral attack upon the conviction, succeeded in seting aside his guilty plea.

Indeed, in *Bryan* v. *United States,* 338 U.S. 552, this Court held that a defendant could be retried after reversal of his conviction for failure of the trial court to direct a verdict of acquittal. Rejecting the defendant's contention that he should be set free because he should have been acquitted by directed verdict at trial, this Court held unanimously (338 U.S. at 560):

> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of

[5] The theory of continuing jeopardy was approved by the American Law Institute in its 1935 recommendations as to the law of double jeopardy. Administration of the Criminal Law, A.L.I. (1935 draft of proposed statute on Double Jeopardy), Section 14. In the more recent Model Penal Code, the Institute did not spell out any particular theory of retrial, but simply provided that double jeopardy did not preclude retrial where a conviction had been reversed on appeal. Model Penal Code (proposed official draft, 1962), Section 1.08(3). Congress adopted a view of continuing jeopardy in enacting the double jeopardy provisions of the Uniform Code of Military Justice, 10 U.S.C. 844. For application of the principle, see *United States* v. *Zimmerman,* 2 U.S.C.M.A. 12.

> acquittal. " * * * where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial."

If the *Ball* rule authorizes retrial when a defendant has erroneously been denied a directed verdict of acquittal, *a fortiori* it also authorizes retrial where (as here) the defendant has merely been denied the chance of obtaining an acquittal from the original jury.

B. THE FUNDAMENTAL PURPOSES OF THE *BALL* RULE APPLY WITH FULL FORCE TO JUDGMENTS ENTERED UPON GUILTY PLEAS

While the scope of the *Ball* rule has generally been defined by references to the concept of "waiver," that doctrine does not, without more, provide a full explanation of the underlying reasons for allowing retrial of a defendant whose conviction has been set aside. Before elaborating those reasons, we would stress that in this country there has never been any substantial doubt as to the soundness of the result or the importance of the purposes the rule serves. The only realistic alternative would be the British system, allowing review of a conviction but forbidding retrial after reversal.* As indicated by the discussion which

* Another alternative—requiring the defendant to remain under a judgment and sentence that may have resulted from error at trial in order to spare him a second trial—was once accepted by Mr. Justice Story sitting on circuit (*United States* v. *Gibert*, 25 Fed. Cas. 1287) but was otherwise rejected by the courts at an early date for reasons best summed up by Mr. Justice McLean's comment that it "guarantees to [the defendant] the right of being hung, to protect him from the danger of a second trial" (*United States* v. *Keen*, 26 Fed. Cas. 686, 690).

follows, we do not believe that this is a desirable approach or that the traditional rule of American jurisprudence should be altered.

1. An obvious and serious objection to forbidding retrial after a conviction is set aside is that it grants the guilty an immunity from punishment simply because of trial error. Important interests of society are at stake in a trial for crime. It reflects no lack of solicitude for the individual's interest in fair and expeditious procedures to say that an error in the course of the trial, *e.g.*, an overzealous comment by a prosecutor, an erroneous ruling on an item of evidence, or the incorrect phrasing of an instruction to the jury, ought not be the final determinant of the questions whether a crime has been committed and whether measures should be taken to deal with the offender.

The *Ball* rule allowing retrial after a conviction has been set aside fully reconciles the very significant right of society to insist that a guilty defendant not be set free because of an erroneous legal ruling and the defendant's right not to be convicted without a fair trial. Without the *Ball* rule, the defendant could only be assured a fair trial at the expense of the no less important need of society to punish the guilty after a fair trial. It is hardly necessary to add that the importance of the *Ball* rule as the sole means of reconciling these otherwise conflicting rights of the defendant and society is magnified as the courts exercise ever-increasing care in scrutinizing the fairness of the trial which has led to a conviction.

The Congress which first passed upon the "double jeopardy" clause plainly believed that the right of society to retry a defendant who has had his conviction set aside is the necessary corollary of the defendant's right to judicial review of his conviction. This is shown by the uniform assumption that a rule allowing retrial after conviction was a right and advantage to which the defendant was entitled because otherwise he would remain under judgment and sentence despite reversible errors at trial. Thus, in opposing an earlier draft of the clause which said that "[n]o person shall be subject * * * to more than one trial or one punishment for the same offence," Representative Benson objected that defendants were "entitled to more than one trial" and Representative Sedgwick "thought, instead of securing the liberty of the subject, [the proposed amendment] would be abridging the privileges of those who were prosecuted." 1 Annals of Congress 753. Representative Sherman spelled out the objection at greater length (*ibid.*):

> * * * He said, that as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor. He thought that the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him. Now the clause as it stands would deprive him of that advantage.

2. There is a second and equally serious objection to a rule forbiding retrial after a judgment against the defendant has been set aside. Inescapably, such a rule would force the reviewing court to consider the defendant's innocence or guilt in making its decision as to the fairness of the trial, for reversal in this context means granting an immunity to the defendant rather than ordering a new trial. The effects on standards of review in the British courts has been conservatively stated in this way:

> * * * Hence, if the court finds that an error was committed below, it has to choose between setting the accused free or affirming his conviction on the ground that error did not result in a substantial miscarriage of justice. It cannot follow a middle course of ordering another trial which would be free of the error which infected the first trial. The result is that some guilty persons are turned loose without punishment for no other reason than that errors were committed in their trials. Whether others are punished who might have been acquitted if their trials had been free of error is a question on which there can be no confident answer. * * *[7]

A rule permitting retrial on reversal of a defendant's conviction is the procedural cornerstone of a system of review designed to assure that the guilt or innocence of the defendant is treated as irrelevant to the propriety of sustaining the judgment against him. Only if the reviewing court is allowed to adopt the

[7] Karlen, *Appellate Courts in the United States and England* (1963), p. 110.

middle ground of ordering a new trial, can there be confidence that it will review the fairness of the trial without regard to the ultimate merits of the sentence imposed upon the defendant. It is the *Ball* rule which alone provides the assurance, lacking in the British system, that a conviction will not be sustained, although trial error may have substantially affected the jury's determination, because of the appellate court's unwillingness to grant immunity to a defendant it regards as plainly guilty.

As this Court has said, "it is not the appellate court's function to determine guilt or innocence";[8] a conviction is not to be sustained merely because "the appellate court is left without doubt that one who claims its corrective process is, after all, guilty,"[9] or because, on reviewing the record, the reviewing judges "reach the conclusion that the error was harmless because [they] think the defendant was guilty."[10] We submit that this standard of review—looking only to the possible effects of the error on the jury—is susceptible of achievement only if the defendant can be retried after his conviction has been set aside. The *Ball* rule is therefore essential to the effectiveness of our system of review in criminal cases. It represents a clear and firm decision that it is better to subject the defendant to the burden of retrial than to inject the issue of his guilt or innocence into a reviewing court's decision on the fairness of his con-

[8] *Kotteakos* v. *United States*, 328 U.S. 750, 763.
[9] *Bollenbach* v. *United States*, 326 U.S. 607, 615.
[10] *Weiler* v. *United States*, 323 U.S. 606, 611.

viction. This Court, we believe, has never departed from this preference for a review procedure affording maximum assurance that a conviction has resulted from a fair trial, albeit the cost of that procedure is the defendant's burden in undergoing retrial.

3. The considerations which support the *Ball* rule are fully applicable to the case at bar; they warrant retrial after a conviction based upon a guilty plea has been set aside. It is clear, we think, that the objection to granting a defendant immunity merely because of error at his trial applies equally when the judge's error has induced a guilty plea. In such a case, no less than in any other case of trial error, the ultimate purpose of a criminal trial—to determine by fair and proper proceedings the guilt or innocence of the accused—has been defeated by an error which calls for correction but not for the abandonment of the prosecution.

The second of the considerations noted above also applies, and with unusual force, in the case of a coerced guilty plea. Assessing the effects of the numerous events and pressures that lead either to a confession or a guilty plea in order to determine whether the defendant's will has been overborne is surely one of the most troublesome tasks that any reviewing court must undertake. The difficulty is not merely that the standards are inevitably less than precise and the facts delicate and complicated. There is the further difficulty that in this situation, more than in any other, the defendant's guilt is likely to be established, and this element may improperly intrude upon the review-

ing court's decision. Except for the rule of the *Ball* case allowing a retrial after reversal of a conviction, this last factor would seriously interfere with the check that a reviewing court furnishes against less-than-fully-voluntary pleas of guilty.

The record in the present case is illustrative of the importance of the *Ball* rule in this regard. Judge Weinfeld did not find this a case of clearly unjustified judicial error. He did not find that the trial judge's announcement of the sentence he intended to impose was designed as a threat to induce Tateo to plead guilty. Tateo's conviction upon his guilty plea was set aside on collateral attack only after a careful analysis and appraisal of a number of factors affecting Tateo's will, including particularly "the normal strain under which a defendant labors during a trial, greatly intensified by the cumulative impact of the testimony offered against petitioner by his co-defendant" (R. 55). Judge Weinfeld ordered a new trial because he feared that the context in which Tateo's plea was made foreclosed "that capacity for reasoned choice, that freedom of will which is essential to a voluntary plea of guilty" (R. 55). The *Ball* rule, permitting him to order a new trial, enabled him to proceed without any reference to the issue of Tateo's innocence or guilt. Indeed, Judge Tyler, who sustained the plea of double jeopardy in this case, noted that Judge Weinfeld's belief that he could order a new trial might have influenced his decision to overturn Tateo's conviction (R. 109–110).

C. THE APPLICABILITY OF THE *Ball* RULE TO JUDGMENTS ON GUILTY PLEAS ENTERED DURING TRIAL IS NOT AFFECTED BY THIS COURT'S DECISIONS IN CASES DEALING WITH MISTRIALS PRIOR TO JUDGMENT

The court below held that "[t]his case is crucially different from the usual instance in which a conviction is set aside under 28 U.S.C. 2255" because "Tateo's trial commenced but was not completed" (R. 131). Relying upon *Downum* v. *United States*, 372 U.S. 734, the court found the *Ball* rule inapplicable when the defendant has been prevented from obtaining the verdict of the first jury empanelled. As we have shown, neither the repeated statements of the *Ball* rule nor its purposes admit of an exception simply because the judgment under attack was entered on a guilty plea after the trial had begun. Moreover, the reconciliation of the cases dealing with mistrials and those dealing with reversals of final judgments is to be found elsewhere.

1. One of the two principal justifications of the *Ball* rule—to permit judicial consideration of alleged trial errors uninfluenced by the consideration that reversal might reward guilt—obviously has no application where a district court has ordered a mistrial for the convenience of the prosecution or the court. *Downum* is such a case—one of mistrial for the convenience of the prosecution. This crucially differentiates the policies applicable to a case such as *Downum* from those in this case and in *Ball* where a retrial is ordered only after reversal of a judgment of conviction.

Procedural considerations analogous to those which justify the *Ball* rule are, however, presented where

the trial judge must determine whether to order a mistrial in order to protect the defendant's right to a fair trial. Even in this context—which is far more difficult than the present case or *Ball* because the traditional doctrine of waiver cannot be applied—this Court has held, for reasons identical to those justifying *Ball*, that the defendant may be retried This is, indeed, the basis of the holding in *Gori* v. *United States*, 367 U.S. 364, 369–370:

> * * * Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused.

2. The court below erred in concluding that the distinction between the *Ball* holding allowing retrial and the *Downum* holding forbidding it lay in the fact that in a case like *Ball* the defendant has enjoyed the right to go to the jury. This distinction has no foundation. By hypothesis, where a jury verdict is reversed on appeal or collateral attack the defendant has *not* enjoyed a meaningful right to take his case to the jury originally assembled. He has been convicted after an unfair trial and the unfairness is often such as to make the jury verdict a nullity.

Thus, when convictions are set aside for errors in instructions and new trials ordered, as in *Andres* v. *United States,* 333 U.S. 740, 752, or *Grunewald* v. *United States,* 353 U.S. 391, 415, the underlying theory is that a verdict based on erroneous principles does not represent a jury determination of the issues. It is even clearer that there has been no meaningful jury verdict where courts have ordered new trials after reversing convictions because of instructions by the trial court which were regarded as tantamount to partial or complete directed verdicts of guilty. See, *e.g., Konda* v. *United States,* 166 Fed. 91 (C.A. 7); *Cummins* v. *United States,* 232 Fed. 844 (C.A. 8); *Dinger* v. *United States,* 28 F. 2d 548 (C.A. 8); *United States* v. *Gollin,* 166 F. 2d 123 (C.A. 3), certiorari denied, 333 U.S. 875; *Schwachter* v. *United States,* 237 F. 2d 640 (C.A. 6); *Edwards* v. *United States,* 286 F. 2d 681 (C.A. 5). Again, there is no real sense in which there is a jury verdict in a case such as *Smith* v. *United States,* 161 U.S. 85, where a conviction was reversed because the judge had told the jury that testimony of witnesses called by the defendant to testify to the reputation of the deceased as a quarrelsome person should be disregarded if the witnesses were themselves convicts. The Court correctly regarded this as a "command to disregard" the defendant's evidence. Also, retrial has been ordered where the judge interferes with jury deliberations by coercive inquiries (*Jacobs* v. *United States,* 279 F. 2d 826 (C.A. 8)) and where comments and questions of the judge belittle the defendant and his case (*United States* v. *DeSisto,* 289 F. 2d 833 (C.A. 2)).

Obviously, in these cases the defendant was, in every meaningful sense, deprived of his right to take his case to the jury. Yet in each he could be retried. We submit that the reason for this cannot be, as the court below held, because there was a meaningless jury verdict. Retrial was allowed in each case because the conditions of the *Ball* rule were satisfied and its purposes served. The same holds true here.

II

EVEN IF THE *Ball* RULE WERE NOT APPLICABLE TO THIS CASE, RETRIAL WOULD BE AUTHORIZED UNDER THE RATIONALE OF THE MISTRIAL CASES

The issue of Tateo's guilt was not decided by the jury originally assembled to hear his case because the conduct of the trial judge—announcing to counsel his plans as to sentence—led Tateo to terminate his trial and to enter a guilty plea. We submit that if Tateo had responded to the trial court's announcement of the proposed sentence by terminating his trial without a guilty plea, *i.e.*, by seeking and obtaining a declaration of mistrial, he could be retried. Therefore, his retrial after Judge Weinfeld set aside his conviction and ordered the retrial he requested (R. 39) is authorized not only under the *Ball* rule, but also under the rationale of this Court's mistrial cases.

We accept Judge Weinfeld's conclusion that, under the stress of a trial going badly for the defendant, the trial judge's statement as to the sentence he would impose rendered Tateo's guilty plea subject to attack. Tateo's plea, we assume, was materially affected by a consideration that should not have entered into his de-

cision whether or not to plead guilty—his knowledge that a conviction on a jury verdict would probably result in a far stiffer sentence than would conviction on a guilty plea. But it is invariably an error or impropriety—of one kind or another—which induces a defendant's motion to terminate one trial and obtain a new trial before a different judge or jury. The factors emphasized by Judge Weinfeld in finding Tateo's guilty plea invalid are the common stuff of motions for a mistrial. Every defendant who asks for a mistrial because of an error of the prosecution or the trial court terminates his trial to avoid consequences to which he should not have been subjected: either having to submit his case to a jury influenced by the prejudicial effects of the trial error or having to try his case before a judge who is unfavorably disposed to him. Also, every decision by a defendant to seek a mistrial is apt to be significantly influenced by the normal stresses of trial and the coercive effects of a strong opposing case.

This analogy to an ordinary mistrial on the defendant's motion is controlling here. Tateo was no more without meaningful alternatives than is any defendant who must choose between accepting the risks of an unfavorably disposed judge or jury and asking for a mistrial. When the court made known its views as to the sentence to be imposed if the case proceeded to a verdict of guilty, Tateo could have chosen to disregard the judge's attitude and to allow the case to go to the jury in the hope of being acquitted; if convicted, he could have taken an appeal and challenged (at the very least) the sentence imposed, relying upon

the judge's earlier statements (see *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7)). Instead, he chose to terminate his trial. In choosing this alternative, Tateo had the assistance of counsel at all times; in fact, he acted on the strong recommendation of counsel and in light of the strength of the government's case. In deciding to terminate his trial, he exercised a choice of the very kind that the courts have invariably treated as meaningful for purposes of applying the doctrine of waiver in cases involving a defense motion for mistrial. There is no reason to treat this case differently because this defendant first pleaded guilty and then, in a collateral proceeding, sought to set aside the plea and obtain a retrial at that stage.

There are no factors of prosecutorial abuse in this case that might conceivably justify barring retrial of the case. As Judge Tyler recognized in upholding the defendant's claim, "the record here is devoid of any hint of error or prejudicial conduct on the part of the prosecution" (R. 133, fn. 4). Nor is immunity required to guard against the prospect that the government might obtain some unfair advantage by a retrial, *e.g.*, an opportunity to buttress a weak case. As Judge Weinfeld found, even the defense counsel was of the opinion "that the Government's case was strong; that there was an excellent chance of conviction" (R. 49). Accordingly, the traditional reason underlying the theory of jeopardy through mistrial—that the government should not seek or obtain a second chance when things did not go well the first time [11]—is totally lacking here.

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[11] *Green* v. *United States*, *supra*, at 187–188; *Gori* v. *United States*, *supra*, at 369; *Downum* v. *United States*, *supra*, at 736.

In sum, to bar retrial in the present case would be to grant immunity as a consequence of an action of the defendant which was no less voluntary than the ordinary defense motion for a mistrial and which was to his advantage in that it terminated a trial which his counsel regarded as extremely likely to result in conviction.[12] Thus, whether the Court treats this case as controlled by the rules generally applicable when a defendant has invoked a postconviction remedy, or deals with it by analogy to the mistrial cases because the defendant was induced to forego proceeding before the original jury, the result is the same: The defendant had every right to lay bare the error, as he belatedly elected, but he enjoys no immunity from the conduct of a new and fair trial.[13]

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[12] Except for *Downum* v. *United States*, 372 U.S. 734, where the facts showed that in substance the mistrial had been declared because the government was not fully prepared for trial, whenever the issue has been presented in the past, this Court has always upheld retrial following discharge of a jury. See: *Simmons* v. *United States*, 142 U.S. 148 (publication of controverted reports of a juror's acquaintance with defendant); *Logan* v. *United States*, 144 U.S. 263 (typical of several "hung jury" cases); *Thompson* v. *United States*, 155 U.S. 271 (discovery of disqualification of juror who had served on grand jury); *Lovato* v. *New Mexico*, 242 U.S. 199 (technical discharge and reswearing of jury in erroneous belief that defendant had not yet pleaded); *Wade* v. *Hunter*, 336 U.S. 684 (court-martial dismissed when military advance of unit made it impractical to obtain additional witnesses desired to be heard by court-martial); *Gori* v. *United States*, 367 U.S. 364 (mistrial granted on court's own motion for what court believed to be misconduct of the prosecutor).

[13] If Tateo is convicted after a fair trial, the sentencing judge would presumably take into account, in imposing a new sentence, the period of time Tateo has already served.

CONCLUSION

For the reasons stated, we respectfully submit that this Court should reverse the judgment below and reinstate the counts of the indictment to which the defendant pleaded guilty.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 328

UNITED STATES OF AMERICA,

Appellant,

v.

ROCCO TATEO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE TATEO

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Constitutional Provision Involved

The pertinent portion of the Fifth Amendment provides as follows:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

Statement

On May 15, 1956, Tateo and another were brought to trial before a jury on a five-count indictment charging bank robbery (18 U.S.C. 2113); kidnapping in connection with the robbery (18 U.S.C. 2113(e)); taking and carrying away bank money (18 U.S.C. 2113(b)); receiving and possessing

stolen bank money (18 U.S.C. 2113(c)); and conspiracy (18 U.S.C. 371).

On Friday, after four days of trial, the Judge told the defendants through counsel what he was to later confirm on sentence:

> ". . . I want you to know that I was very serious and earnest when I said that if you had been convicted by the jury I intended to give you the absolute maximum sentence, a life sentence plus all of these years to follow the life sentence.
>
> If anybody wonders how one can serve a sentence after he has served a life sentence, it is very simple, because in a life sentence you are eligible for parole in fifteen years; but with a sentence to follow a life sentence, you are not eligible for parole on the life sentence, and you have to stay in jail for the rest of your life." (R. 23)

Under the impact of the Judge's attitude Tateo entered a plea of guilty on the following Monday and the next day the co-defendant changed his plea and the jury was discharged. Tateo was sentenced to imprisonment for 22 years and 6 months and the prosecution consented to the dismissal of the kidnapping count on Tateo's motion.

On February 8, 1963, Judge Weinfeld granted Tateo's motion under 28 U.S.C. 2255 to vacate the conviction, finding that:

> "The realities of human nature and common experience compel the conclusion that the defendant was enveloped by a coercive force resulting from the knowledge conveyed to him of the Court's attitude as to sentence which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea of guilty." (R. 56-57)

and:

> "No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty—that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term." (R. 55)

Tateo was reindicted for the kidnapping offense and brought before Judge Tyler for retrial of this charge and the four bank robbery charges to which he had previously pleaded guilty. Prior to the second trial, Judge Tyler sustained defense motions to dismiss both the new kidnapping indictment and the four bank robbery counts of the original indictment and ordered Tateo discharged from prison, just one month short of seven years after the original sentence. As to all counts, Judge Tyler held that:

> "Since neither constitutionally sound consent nor an 'exceptional circumstance' underpinned the termination here, a second trial is constitutionally impermissible." (R. 131)

The Government has abandoned the capital kidnapping count and has appealed to this Court only from that part of the judgment which barred the retrial on the other four counts.

Summary of the Argument

1. Tateo's trial was improperly terminated because of the coercive actions of the trial judge which led to his plea of guilty and the discharge of the jury.

Under long established and well understood rules, once a defendant's criminal trial commences it may be terminated short of verdict only by reason of some "imperious necessity" or at the defendant's request. In certain circumstances it may be terminated by the trial judge acting solely in the defendant's interests.

There is no rational way in which a trial judge's fixed intention to impose a life sentence and a consecutive term of years can be construed as an imperious necessity to terminate the trial, or a consent by the defendant to its termination, or an action taken by the court solely in the interests of the defendant.

This Court's decision in *Downum* v. *United States,* 372 U.S. 734 makes plain that any impermissible termination short of verdict bars a retrial. Perforce, the improper termination of Tateo's trial after four days of the Government's case bars his retrial after seven years of imprisonment.

2. Nothing in the customary rule of retrial after appellate reversal demands, much less allows, that Tateo be required to abandon the Fifth Amendment's protection against double jeopardy in regard to the discharge of the trial jury in order to seek relief from a plea and sentence, which were the result of coercion.

This Court in *Green* v. *United States,* 355 U.S. 184, has specifically rejected the notion, once again advanced by the Government, that the rule permitting retrials after reversal

as enunciated in *United States* v. *Ball*, 163 U.S. 662, operates to deprive a defendant of the constitutional right to be protected against a second jeopardy when he seeks relief from a different judicial error. The customary application of the *Ball* rule is unimpaired by the decision of the District Court in this case, and no considerations of "policy" advanced by the Government to show the merits of the rule justify abrogating an express provision of the Constitution of the United States.

ARGUMENT

I.

Tateo's First Trial Was Terminated by the Coercive Action of the Trial Judge and Therefore He Cannot Be Tried Again.

Once a jury is assembled and a criminal trial commences it may be properly terminated short of the jury's verdict only under clearly defined circumstances. Improper termination bars retrial and the termination here was improper.

The first group of circumstances which justify the termination of a criminal jury trial short of verdict are those of "imperious necessity" which obstruct the completion of the trial, as, for example, the inability of the jury to agree (*United States* v. *Perez*, 9 Wheat. 579), or battlefield conditions (*Wade* v. *Hunter*, 336 U.S. 684). There is no quarrel with this principle but it has no application to the issues before the Court in this case.

The second group of circumstances which justify a termination short of verdict are those in which a defendant voluntarily asks for or knowingly consents to the termination of the trial, presumably because it is to his advantage to do so. In *Gori* v. *United States*, 367 U.S. 364 this Court

extended the rule permitting retrial where the defendant moves for a mistrial to those cases in which the trial judge declares a mistrial to protect the rights of the defendant.

> "Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." *Id.* 369

The Court deferred the question which is now presented for decision:

> "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment— . . ." *Id.* 369

Mr. Justice Story, writing in *United States* v. *Perez*, 9 Wheat. 579, for a unanimous Supreme Court, set out the standards by which Federal Courts should be guided in the granting of mistrials. That standard has been the consistent guide for the exercise of judicial discretion in the discharge of criminal juries short of verdict and was quoted with approval in *Gori, supra,* and relied upon by Judge Tyler in deciding this case.

> " • • • We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain

> and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. * * *" 9 Wheat., at page 580. *Gori* v. *United States*, 367 U.S. 364, 368-369

It is hard to see how the Government can argue that there were plain and urgent circumstances, or that the Court was being extremely careful as to how it interfered with any chances of the defendant. Just the opposite was true. Judge Weinfeld found that:

> "The choice open to this defendant when apprised during the trial of the Court's statement was rather severely limited. If, as was his constitutional right, he continued with the trial and were found guilty, he faced, in the light of the Court's announced attitude, the imposition of a life sentence upon the kidnapping charge, plus additional time upon the other counts, a sentence which his lawyer informed him and which he believed, not without reason, meant life imprisonment." (R. 53)

and Judge Tyler found that Tateo:

> ". . . was coerced from availing himself of his Fifth Amendment right to go to the original jury for its verdict of guilt or innocence." (R. 132)

This case presents no question of a defendant asking for or consenting to a termination of his trial short of verdict, nor of a trial judge declaring a mistrial because of a tender regard for the rights of the defendant. If Tateo had chosen

to plead guilty and elected to terminate the trial, there would be no question of double jeopardy. However, both the plea and the termination of the trial were the coerced result of the Trial Judge's conduct, and therefore Tateo may not once again be placed in jeopardy of life and limb.

The Government contends that the fact that the trial was improperly terminated is not controlling, as there are many cases retried after reversal where errors during the trial deprive the defendant of a meaningful right to get to the jury, such as errors in instruction, prejudicial comments by the prosecutor, or coercive interference with jury deliberations. (Appellant's Brief, 20-22)

The answer to this is that an appeal taken after a jury verdict gives the defendant an additional measure of protection. Not only does he have the right to have the jury decide his case, but he also is guaranteed by appellate review the right to have the jury decide his case free from the influence of error. Tateo was deprived of the right to have a jury consider his case at all.

The realities of jury trials demonstrate that the Government sells the right of jury trial too cheap by equating it with the right to have an error-free case submitted to the jury. Surely it is not unfair to assume that at least some of the juries which acquit defendants do so after trials in which reversible error has been committed. Tactically, as every trial lawyer knows, there are many instances in which a defendant will forego a motion for a mistrial in favor of the right of having his case decided by the jury.

When Tateo was coerced out of his right to have the jury which began his case sit and decide it, he was done a fundamental and irreparable injury.

The Government also contends that Tateo had a variety of alternatives and that he exercised a "meaningful choice"

among them. (Appellant's Brief, 24) He could, the Government suggests, have proceeded to verdict and appealed the sentence. But it would be an audacious trial lawyer indeed who would advise a client in a Federal Court to risk a life in prison without hope of parole on the basis of an appellate review of his sentence, for there is no power to review a sentence within the statutory maximum either in the Supreme Court (*Gore* v. *United States*, 357 U.S. 386, 393) or in the Court of Appeals (*Pependrea* v. *United States*, 275 F.2d 325, 329 (C.A. 9)).[1]

The Government suggests that Tateo could have moved for a mistrial and that had it been granted he would have been subjected to retrial. (Appellant's Brief, 22) However, when one remembers that it was the Judge's fixed purpose to impose a Draconian sentence which was at the base of the termination and the judgment here, it seems plain that it is unrealistic to expect the defendant to have braved the anger of the Judge who would sentence him in the event of conviction by attacking the Judge's attitude on the question of sentence on the motion for a mistrial.

The measure of the value which this Court has placed upon the defendant's right to complete his trial before the jury which commences to hear it may be gaged by the decision in *Downum* v. *United States*, 372 U.S. 734, upon which Judge Tyler relied so heavily in barring retrial. In *Downum* the jury was impanelled and discharged when it was discovered that a Government witness was unavailable.

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[1] In *Beckett* v. *United States*, 84 F.2d 731, 733, two middle-aged Negro physicians were sentenced to 25 and 21 years, respectively, for a mail fraud involving about two thousand dollars; the Court noted that there was, "fortunately," relief from judicial harshness, but that it was in the pardoning power of the executive, hardly the sort of precedent to comfort a man charged with bank robbery and on trial before a judge minded to impose maximum penalties.

A second trial was commenced two days later which this Court held was barred by the protection against double jeopardy.[2]

> "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori* v. *United States*, *supra*, 369. But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances,' to use the words of Mr. Justice Story in *United States* v. *Coolidge*, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' *United States* v. *Ball*, 163 U.S. 662, 669." *Id.* 736

Scholastic ingenuity can conjure up a number of contingencies which would have left Tateo in a different position than the one in which he now stands,[3] but the reality of the case is that Tateo was coercively deprived, after four

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[2] The Supreme Court of Washington reached a similar result in *State* v. *Connors*, 59 Wash. 2d 879, 882; 371 P. 2d 541, 544, where the jury was improperly separated after being impanelled without hearing evidence and the trial court declared a mistrial on its own motion and a second trial was commenced the same afternoon. Considering ". . . the problem from the standpoint of the right of a defendant to have his case determined by the jury which he has accepted and which has been impanelled and sworn to try his case . . ." it held that where ". . . a jury has been impanelled and sworn to try the case, the defendant has the right to have his case determined by that jury . . ." and voided the verdict of the second trial.

[3] It is equally true that had the Government in *Downum*, *supra*, asked for a two-day adjournment instead of impanelling a jury, the result, in all probability, would have been very different.

days of trial jeopardy, of his right to have the jury decide his case and was additionally coerced into pleading guilty and serving seven years in prison. The Government now seeks to place him in jeopardy for the same crimes a second time.

The United States Attorney's conduct at the first trial contributed no prejudicial element which induced the improper termination of that trial, and accordingly, the Government understandably is vexed that it cannot try the defendant again,[4] but the double jeopardy protection of the Fifth Amendment is no mere procedural device to regulate Government conduct and thus secure a substantive right, as is the procedural rule forbidding the use in court of illegally seized evidence which enforces the right of the people to be secure from unreasonable searches and seizures. The protection against double jeopardy is a fundamental ingredient of our freedoms.

II.

Under the Rule in Green v. United States, 355 U.S. 184, the Defendant Tateo Is Not Required to Barter Away His Protection Against Double Jeopardy Arising From the Improper Discharge of the Trial Jury in Order to Attack the Coerced Plea of Guilty.

Two separate legal wrongs were done to the defendant Tateo. First, he was coerced into pleading guilty and sentenced to 22 years and 6 months in prison as a result of that plea. Second, he was deprived of his right to have

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[4] But it is the violation of the defendant's right to be free from successive jeopardies and not the conduct of the Government which is controlling. Thus, in *Fong Foo* v. *United States*, 369 U.S. 141, this Court barred retrial when the Government was not only free from misconduct but had not even had a fair opportunity to put in its evidence.

the jury impanelled to hear his case, consider it and render a verdict. The first wrong was redressed when Judge Weinfeld set aside the plea and judgment. The second wrong was redressed when Judge Tyler held that Tateo could not be tried again.

Put in another way, Tateo had two valid pleas which prevented his retrial. One was in the nature of *autrefois convict* and the other was a plea of former jeopardy. When, by his own action, he set aside the conviction, he relinquished the plea of *autrefois convict*, but no rule of law, logic or policy permits, much less requires, that he additionally forego his objection to retrial on the ground of his former jeopardy.

The Government takes the position that the judgment here having been set aside at the instance of the defendant, he may be retried under the rule of *United States* v. *Ball*, 163 U.S. 662, and urges that the rationale of the *Ball* decision and the policy considerations underpinning it make it applicable to this case.

There is no doubt that at this point in history, the *Ball* rule is firmly engrafted on to the plain meaning of the Constitution, and despite the words "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * * " in the Fifth Amendment, the rule of retrial for the same offense after reversal is the current law. The *Ball* rule does no more than put the defendant in *status quo ante*. After a trial infected with error is reversed the defendant is given a new and fair trial. After an improper pretrial of guilty which is set aside, the defendant confronts anew the choice of whether or not to plead guilty. Reduced to its essentials the *Ball* rule simply deprives a defendant of the protection

against double jeopardy in a measure coequal to the scope of his attack, but it does not impose a penalty on a defendant by requiring him to surrender constitutional rights such as the protection against double jeopardy in order to exercise a statutory right such as appeal or collateral attack under 28 U.S.C. 2255.

It is not true that any legal attack on a prior proceeding will lay the defendant open to retrial on every part of the prior charges. In *Green* v. *United States,* 355 U.S. 184, this Court held that a defendant tried and convicted of a lesser offense (murder in the second degree) could not on retrial after reversal be convicted of the principal offense (murder in the first degree) originally charged. That rule applies with full force to this case. In order to vindicate his right to be relieved of the judgment rendered on the coerced plea of guilty Tateo should not be required to give up the protection of the constitutional safeguard against double jeopardy.

The *Ball* rule has sometimes been justified as resting upon a theory of waiver and sometimes, though never by a majority of the Court, as resting on the theory that by bringing further proceedings the defendant continues the original jeopardy. In *Green* v. *United States, supra,* the Court cast grave doubt on, if it did not indeed reject outright, the theory of waiver, and quoted with approval, as did Judge Tyler, the view expressed by Mr. Justice Holmes, dissenting in *Kepner* v. *United States,* 195 U.S. 100 at 135:

> "'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to

be saved by an express clause in the Constitution of the United States.'" *Green, supra* at 207.[5]

If any waiver is to be found here it will have to be of the legal fiction kind, for the defendant's motion was to vacate the judgment and be discharged from custody (R. 36), and the Government's brief to the contrary notwithstanding (Appellant's Brief, 22), the most that can be made of the formalistic language of the moving papers is a request by Tateo that he be discharged from custody or in the alternative that he be re-arraigned to plead *de novo* to the indictment. (R. 39) This latter course was substantially what occurred and the defendant effectively entered a plea in bar on the grounds of former jeopardy.[6]

The issue before the Court is whether it will now extend the *Ball* rule, as it refused to do in *Green, supra*, and require the defendant Tateo to surrender his protection against double jeopardy in order to be free of a sentence imposed by coercion. To hold, as Judge Tyler did, that he does not give up the one right in seeking to secure the other, does not impair the usual and customary application of the *Ball* rule.[7]

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[5] A similar view that both the waiver and continuing jeopardy explanations for retrial after reversal are tautological statements of a result rather than analytic explanations is to be found in Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 6-7.

[6] See 18 U.S.C. 3731 and *United States* v. *Ball*, 163 U.S. 662, 665; *Ex Parte Nielson*, 131 U.S. 176, 177; all to the effect that the double jeopardy defense is by way of a plea in bar.

[7] As this case does not involve an attack on the *Ball* rule, we do not think it appropriate to treat extensively that question, shrouded in historical obscurity, of whether the rule comports with the original understanding of the framers of the Constitution, except to note that Mr. Justice Story, who was far closer in historical time than we are, thought that it did not, and in *United States* v. *Gibert*,

None of the policy reasons advanced on behalf of the *Ball* rule warrant its extension to this case. The Government asserts that to bar a retrial of Tateo would be to grant an immunity from punishment "simply" because of "trial error". (Appellant's Brief, 13)

Tateo, after seven years in prison under a coerced plea of guilty, can hardly be said to be receiving an immunity bath. The Government in a footnote (Appellant's Brief, 25, footnote 13) presumes that if Tateo were convicted again, the sentencing judge would take the time Tateo has already served into account when imposing sentence. This solicitude is new-found, for the prosecutor in the Court below was apparently ready to ask the death penalty at the retrial even though the Government had not done so at the first trial (R. 71-73), and announced his intention of using the minutes of the collateral proceedings to prove an "admission" made by the defendant to Judge Weinfeld (R. 124). If Judge Tyler had not barred retrial, Tateo, after seven years in prison, would have run the risk on retrial of having the testimony he gave in his collateral attack on the coerced plea of guilty used against him, and might have waited in the shadow of the electric chair until this Court decided whether the rule of *Green, supra*, applied to his case. Beyond any advantage which might accrue to the Government on retrial, there is an enormous and obvious prejudice to a defendant who has suffered long years of imprisonment under an unjust conviction in being required to undergo for a second time the ordeal of trial.

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25 Fed. Cas. 1287 (No. 15204) (1834), in a closely reasoned opinion resting upon the English precedents and the Seventh Amendment provision that no jury finding in a civil suit could be re-examined except under common law rules came to that conclusion. See also *Green, supra*, at 189 (opinion of the Court) and at 201-204 (dissenting opinion).

Almost every search involving contraband which is found to be illegal means a practical grant of immunity and this is true not because of "trial error" on the part of judges and lawyers, but because of wrong conduct on the part of police officers.

A solicitude for the basic preconditions of a free society and not a tenderness towards criminals makes our courts daily suppress evidence seized in violation of the Fourth Amendment (*Weeks* v. *United States*, 232 U.S. 383) and impelled this Court to make the protection of the Fourth Amendment binding against the states (*Mapp* v. *Ohio*, 367 U.S. 643; *Ker* v. *California*, 374 U.S. 23, 33).

By its very nature, the protection against double jeopardy always will be invoked by a defendant who, after conviction, acquittal or mistrial, seeks to bar a further trial that some prosecutor feels advances the cause of law and order. The protection against double jeopardy, like the other rights saved by express clauses of the Constitution of the United States, is a protection of the citizens of this country to which prosecutorial zeal must yield.

The second policy reason the Government advances for extending the *Ball* rule to cover this case is that where retrial is permitted, reviewing courts are freer in recognizing error and reversing convictions, uninfluenced by circumstances of guilt or innocence; but even under the traditional retrial rule, appellate courts are not wholly uninfluenced by such considerations.*

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* Rule 52 of the Federal Rules of Criminal Procedure, the harmless error rule, is regularly applied by courts with a view to the strength of proof of guilt. See *Garner* v. *United States*, 277 F.2d 242, 245 (C.A. 8) (error which might call for reversal in a close case disregarded because of the strong evidence of guilt); *Apt* v. *United States*, 13 F.2d 126, 127 (C.A. 8) (a "righteous" verdict sustained in spite of an indefensible cross-examination); *Amendola* v. *United States*, 17 F.2d 529, 530 (C.A. 2) (reversal on error which might otherwise be held harmless because of severity of sentence).

The Government's view that retrial after reversal leads to more adequate appellate consideration of defendants' rights and thereby confers a benefit upon defendants, takes a bizarre turn when it is advanced as a reason for abrogating an express provision of the Constitution. Every plea of double jeopardy when sustained necessarily involves barring retrial. This Court in *Downum, supra,* barred a retrial where the defendant had been properly convicted after a constitutionally impermissible second trial.

It is equally true that in a broad and active area of constitutional protections, that of the Fourth Amendment protection against unreasonable searches and seizures, reviewing courts know that in a great many cases the suppression of illegally seized evidence, as a practical matter, stops prosecution, and yet this Court, in the landmark decision of *Mapp* v. *Ohio,* 367 U.S. 643, extended to the States the Federal rule (*Weeks* v. *United States,* 232 U.S. 383) forbidding the use in evidence of the fruits of unconstitutional searches and seizures. The fact that retrial is frequently impossible after the suppression of illegally seized evidence did not outweigh the importance of vindicating a fundamental right expressly set out in the Constitution of the United States. To argue, as the Government does, that the constitutional protection against double jeopardy should be constricted in order to facilitate appellate review is to turn justice upside down.

Tateo's first trial jury was discharged as a result of the Trial Court's coercive conduct which led to his plea of guilty.

It is unfair that after seven years in prison the defendant Tateo should be asked to run the gauntlet a second time. We ask that the Court once again, as it did in *Downum* v. *United States, supra* at 738, " . . . resolve any doubt 'in

favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.'"

Conclusion

For the reasons stated, we respectfully submit that this Court should affirm the judgment of the District Court which barred the defendant's being twice placed in jeopardy.

Respectfully submitted,

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